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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 226.

CHICAGO AND ALTON RAILROAD COMPANY, PLAINTIFF
IN ERROR,

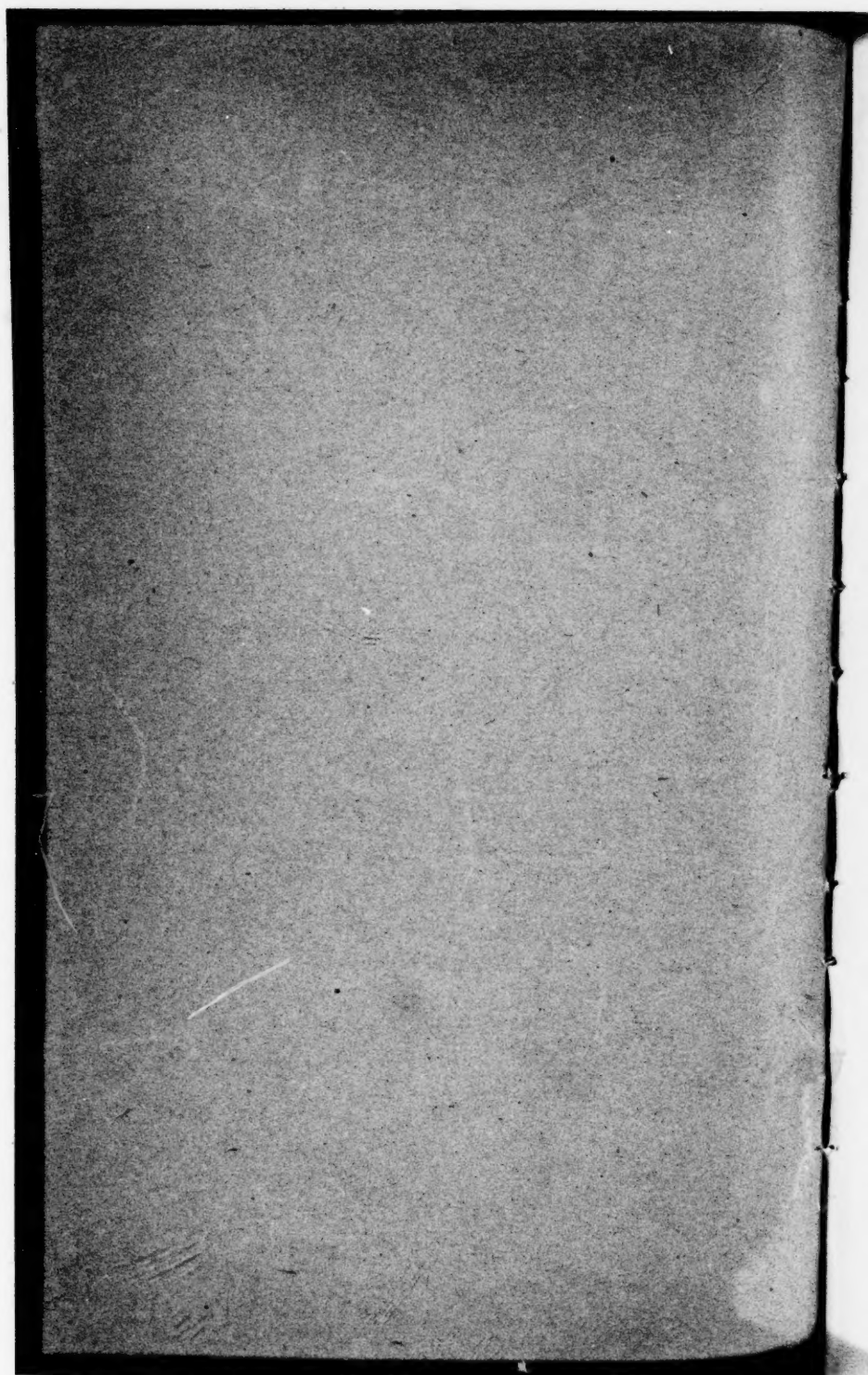
vs.

NATHANIEL T. KIRBY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

FILED MARCH 9, 1910.

(22,057)



(22,057)

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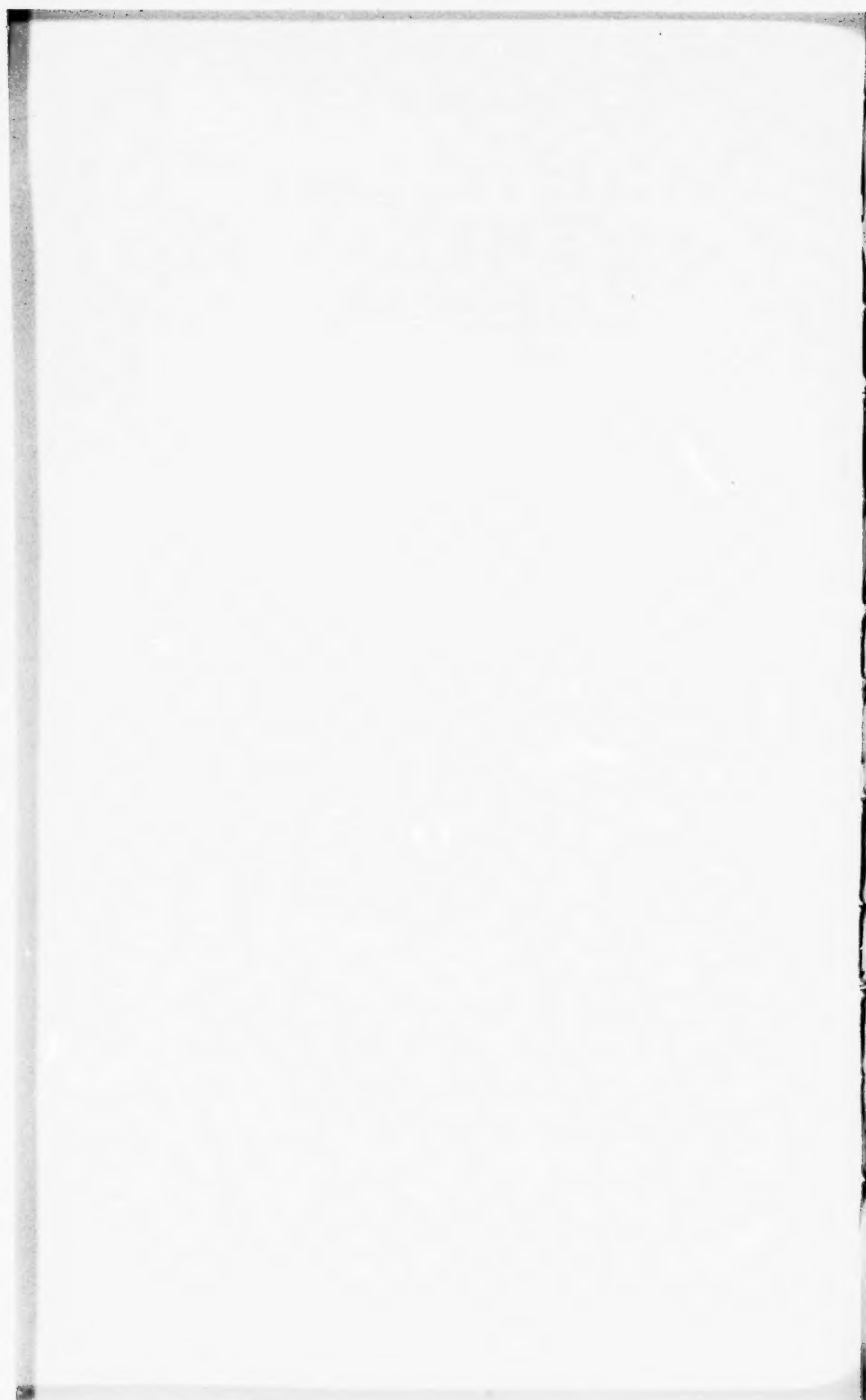
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1 At a Supreme Court, Begun and Held at Springfield, on Tuesday, the First Day of December, in the Year of Our Lord One Thousand Nine Hundred and Eight, Within and for the State of Illinois.

Present.—James H. Cartwright, Chief Justice; John P. Hand, Justice; William M. Farmer, Justice; Orrin N. Carter, Justice; Guy C. Scott, Justice; Alonzo K. Vickers, Justice; Frank K. Dunn, Justice; William H. Stead, Attorney General; Warren C. Murray, Bailiff.

Attest:

J. McCAN DAVIS, Clerk.

Be it remembered, to-wit on the Thirteenth day of January A. D. 1909, the same being one of the days in vacation after the term of Court aforesaid the record of the proceedings in the Circuit Court of Sangamon County and the Appellate Court of Third District was filed by appellant Chicago & Alton Railroad Company in the office of the Clerk of the Supreme Court in words and figures following, to-wit:

No. 6540.

N. T. KIRBY, Appellee,

vs.

CHICAGO & ALTON RAILROAD COMPANY, Appellant.

Appeal from Third Dist.

2 STATE OF ILLINOIS,
Sangamon County, ss:

Pleas, before the Hon. James A. Creighton, Judge of the Seventh Judicial Circuit of the State of Illinois (which said Circuit is composed of the counties of Sangamon, Macoupin, Morgan, Scott, Greene and Jersey) at a term of said Sangamon County Circuit Court, begun and held at the Court House in the City of Springfield, County and State aforesaid, on the first Monday (the same being the sixth day) of January in the year of our Lord one thousand nine hundred and eight:

Present:

Hon. James A. Creighton, Judge.
Frank L. Hatch, State's Attorney.
Charles Werner, Sheriff.
S. T. Jones, Clerk.

Be it remembered that on the 26th day of April A. D. 1906, there was filed in the office of the Clerk of said Sangamon County Circuit Court, a certain Precipe: which said Precipe is in the words and figures as follows to-wit:

STATE OF ILLINOIS,
Sangamon County, ss:

Circuit Court, May Term, A. D. 1908.

NATHANIEL T. KIRBY

VS.

CHICAGO & ALTON RAILROAD COMPANY.

Action of Assumpsit.

From \$3000 to \$5000.

Damages, \$5000.

The Clerk will issue summons in the above entitled cause, directed to the Sheriff of said county, returnable to the May term A. D. 1906.

ALBERT SALZENSTEIN,
Plaintiff's Attorney.

Springfield, April 26, 1906.

3 — do hereby enter — security for all costs which may accrue in the above cause.

Dated this — day of —, 190—.

Approved — —, A. D. 190—.
— —, *Clerk.*

Gen. No. 20684. Sangamon County Circuit Court. — Term, 1906. Nathaniel T. Kirby vs. C. & A. R. R. Co. Assumpsit. Filed Apr. 26, 1906. S. T. Jones, Clerk. Præcipe A. Salzenstein, Plaintiff's Attorney. Fee Book 44, page 404.

And afterwards to-wit on the 26th day of April A. D. 1906 there was filed in the office of the Clerk of said Sangamon County Circuit Court a certain Declaration; which said Declaration is in the words and figures as follows to-wit:

STATE OF ILLINOIS,
Sangamon County, ss:

In the Circuit Court Thereof to the May Term, 1906.

Nathaniel T. Kirby, plaintiff by A. Salzenstein, his attorney complains of the Chicago & Alton Railroad Company of a plea of trespass on the case on promise:

For that whereas said defendant on to-wit: January 24, 1906, and during said time at to-wit the County aforesaid was a common carrier of goods, horses, stock and passenger for hire, then doing business (under the name of the Chicago & Alton Railway Com-

pany) and as such operated and ran a line of railroad from the City of East St. Louis to the City of Chicago, Illinois, passing through the City of Springfield in said County of Sangamon and made connection with and transferred its care on its road to various other common carriers along the line of its said railroad, to be carried by said latter on their said lines, and on the day and year first aforesaid by its authorized agent in consideration that the plaintiff would ship a certain car load of high bred trotting horses over its road which it knew he was going to ship to New York

4 City that month to be sold at the great horse sale of high bred trotting and pacing stock to be held during said month at Madison Square Garden in the said last named City, then and there promised said plaintiff that it would arrange and agree that said stock would be promptly carried and delivered so as to be carried to New York on the fast stock train on the Michigan Central Railroad with which it connected at Joilet, Illinois, known as "The Horse Special," and would have said car load of horses carried through to New York as aforesaid for the sum of \$170.60, and plaintiff relying upon said promises accepted said offer and agreed to ship the said stock aforesaid consisting of Fourteen (14) head of high bred trotters as proposed and offered by defendant, and did thereafter on to-wit January 15, 1906, notify said defendant that he would so ship and deliver it for shipment on January 24, 1906, said horses to be carried and transported to New York on the terms, and in the manner proposed and agreed by defendant as aforesaid, and defendant did then and there on to-wit January 22nd, 1906, agree and undertake to have said car load of horses promptly carried and delivered so that the same should be delivered so that the same should be carried and transported on the said fast stock train of the Michigan Central Railroad known as the "Horse Special" to New York for the total sum of \$170.60, transportation charges from Springfield to New York, and plaintiff avers that in reliance on the said promises and undertakings of the defendant in that behalf as aforesaid did on to-wit January 24, 1906 at Springfield in said County of Sangamon deliver said horses to said defendant for transportation as aforesaid under the said terms and agreements aforesaid, and the defendant did then and there receive and take them for transportation as aforesaid; on the terms and agreement aforesaid and plaintiff avers that it then and there became

5 and was the duty of the defendant to have carried the same and to have promptly delivered same to the said Michigan Central Railroad Company so that said horses could have been carried by said latter company on said fast train known as "The Horse Special" but that the defendant wholly disregarding and neglecting its duty in that behalf, did not so deliver the same to the Michigan Central Railroad Company so that said horses could be carried on said Horse Special to New York which if done said horses would have reached New York on the morning of January 27, 1906 at or about 7 o'clock but neglected and failed to do, whereby by reason of such neglect and failure to deliver in time said plaintiff was obliged to make arrangements to have them

carried to New York the best way he could which was by inferior and slower means of transportation, whereby said stock was delayed in transportation and did not reach New York until January 29, 1906 at or about 12 o'clock at noon, and too late to be put in proper shape for exhibition and sale at the said horse sale at Madison Square Garden as was contemplated by the parties at the time plaintiff made his aforesaid agreement and contract with defendant and by reason of such delay and inferior transportation all of said horses were damaged and depreciated in value and several of them became sick and one of them seriously sick. See amendment to declaration.

NOTE.—Stricken out by amendment to declaration

(And none of said horses brought as much as they would (have done if they had been carried on the Horse Special as (had been contracted for them, so as to have had the advantage of quick transportation. Such difference in amount (averaging in the case of thirteen (13) of said Horses (\$150.00 per head and amounting in the case of the other (which was sick to \$1000.00 and in addition, plaintiff was (obliged to and did pay \$200.50 for such inferior transportation being \$29.90 in excess of the stipulation price under (the contract for transportation to the damage of the
By amendment \$5000.00
(plaintiff of \$3000.00 and therefore he brings this suit.)

ALBERT SALZENSTEIN,
Plaintiff's Attorney.

6 And afterwards to-wit on the 26th day of April A. D. 1906, there issued out of the office of the Clerk of said Sangamon County Circuit Court a certain summons; which said summons together with the endorsements of the Sheriff thereon is in the words and figures as follows to-wit:

STATE OF ILLINOIS,
Sangamon County, ss:

To the People of the State of Illinois to the Sheriff of Sangamon County, Greeting:

We command you to summons Chicago and Alton Railroad Company if to be found in your county, to appear before the Circuit Court of Sangamon County, on the first day of the next term thereof to be holden at the Court House in the City of Springfield, on the first Monday in the month of May A. D. 1906 to answer unto Nathaniel T. Kirby in an action of Assumpsit Damages \$3,000.00--Amend \$5000 and hereof make due return to our said Court as the law directs.

Witness, S. T. Jones, Clerk of said Court and the Judicial Seal thereof at Springfield this 26th day of April A. D. 1906.

[CIRCUIT COURT SEAL.]

S. T. JONES, *Clerk.*

Summons.

Sangamon County Circuit Court, to May Term, A. D. 1906.

NATHANIEL T. KIRBY

v.

C. & A. R. R. Co.

Fees:

Service65
Copy10
Mileage10
Return10
Total.....	.95

Filed Apr. 26, 1906.

S. T. JONES, *Clerk.*
A. SALZENSTEIN,
Plaintiff's Att'y.

STATE OF ILLINOIS,
Sangamon County, ss:

I have served the within writ on the within named Chicago and Alton Railroad Company by reading the within to W. P. Eggleston, Freight Agent of Chicago and Alton Railroad Company and at the same time delivering to the said W. P. Eggleston a true copy of the within writ this 26th day of April A. D. 1906. The President of Chicago & Alton Railroad Company not found in my county.

B. H. BRAINERD, *Sheriff.*

7 And afterwards to-wit on the 27th day of April A. D. 1906, there was filed in the office of the Clerk of said Sangamon County Circuit Court a certain copy of account sued on; which said copy of account is in the words and figures as follows, to-wit:

Copy of Account.

Chicago & Alton R. R. Co. to Nathaniel T. Kirby, Dr.

To damages and loss occasioned by breach of contract to 13 horses as stated in the declaration filed in this cause at \$150.00 each.....	\$1950.00
To do. occasioned to one horse sickness, etc.....	\$1000.00
To excess payment over contract price of shipment 1 car trotter horses.....	29.90
Total	\$2979.90

And afterwards to-wit on the 9th day of May A. D. 1906 the same being one of the term days of the May term A. D. 1906 of said Sangamon County Circuit Court, the following among other proceedings was had and entered of record as follows to-wit:

NATHANIEL T. KIRBY, Plaintiff,
vs.
CHICAGO & ALTON RAILWAY COMPANY, Defendant.

Assumpsit.

On motion of the defendant by its attorneys leave is hereby given it to plead by the 17th inst.

And afterwards to-wit on the 16th day of May A. D. 1906 there was filed in the office of the clerk of said Sangamon County Circuit Court a certain general issue; which said general issue is in the words and figures as follows to-wit:

STATE OF ILLINOIS,
Sangamon County, ss:

In the Circuit Court, to the May Term, A. D. 1906.

C. & A. R. R. Co.
ats.
NATHANIEL T. KIRBY.

8 And the defendant by Patton & Patton, its attorneys, comes and defends the wrong and injury, when, etc. and says that it did not promise in manner and form as the plaintiff has above thereof complained against it;

And of this the defendant puts itself upon the country etc.

PATTON & PATTON,
Defendant's Attorneys.

And afterwards to-wit on the 16th day of April A. D. 1907 the same being one of the term days of the March term A. D. 1907 of said Sangamon County Circuit Court, the following among other proceedings was had and entered of record as follows to-wit:

NATHANIEL T. KIRBY, Plaintiff,
vs.
CHICAGO & ALTON RAILWAY COMPANY, Defendant.

Assumpsit.

And now come the parties hereto by their respective attorneys and by agreement of the said parties this cause is continued on statement on file, at defendant's costs.

It is therefore ordered and adjudged by the Court that the said plaintiff have and recover of and from the said defendant, his costs by him at this term herein expended and that he have execution therefor.

And afterwards to-wit on the 3rd day of February A. D. 1908, there was filed in the office of the Clerk of said Sangamon County Circuit Court a certain stipulation as to certain facts; which said stipulation is in the words and figures as follows to-wit:

STATE OF ILLINOIS,
County of Sangamon, ss:

In the Circuit Court, to the January Term, A. D. 1908.

N. T. KIRBY

v.

CHICAGO & ALTON RAILROAD CO.

Stipulation as to Certain Facts.

9 It is hereby stipulated by and between the parties hereto by their respective counsel;

I.

That the defendant did not advise the Michigan Central Railroad Company at Joliet, Illinois, at any time prior to January 25th 1906, that the horses of the plaintiff were consigned from Springfield, Illinois, by way of Joliet, care of Fast Horse Train out of Chicago on Michigan Central Railroad January 25th and notice was not given prior to departure of the first train out of Joliet on the M. C. R. on the morning of Jan. 25th.

II.

That Mr. Mohr, Freight Agent of the Michigan Central Railroad Company at Joliet received no notice from the defendant of the arrival of the horses at Joliet, until about ten o'clock A. M. January 25th, 1906.

III.

That car No. 6082 A. P. H. Co. containing Mr. Kirby's horses was billed by the Michigan Central R. Co. to 130th St. Station New York.

IV.

That said car arrived at 130th st. Station on the morning of January 29th, 1906.

V.

That Mr. Kirby called at 130th S. Station at about 8 A. M. January 29th, 1906, and signed an order to have the car moved

to Fiss, Doerr and Carroll's stables at 36th St. and 11th ave. and at his request, car was so rebilled.

VI.

That a switch engine was immediately sent for, which engine delivered the car at Fiss, Doerr and Carroll's stables at 12.30 P. M. January 29th.

VII.

That the horses were there unloaded and were there kept for about twenty-four hours.

10

VIII.

That the horses were delivered at Fasig-Tipton's stables late in the afternoon of Tuesday, January 30th.

IX.

That proof can be made that the joint interstate tariff, rate sheets and official classification which were on file in the freight depot of defendant at Springfield, Illinois, at the time of the making of the contract of shipment had been duly filed with the Interstate Commerce Commission and published in accordance with the rules of such Commission, and that such proof shall be considered as made.

And it is stipulated that copies thereof may be used in evidence in this cause, without the certificate and seal of the Secretary of said Commission, and that such copies shall not be objected to for or on account of absence of proof of due filing and publication or other matter of form.

Dated this first day of February A. D. 1908.

SALZENSTEIN & J. M. GRAHAM,

Attorney- for Plaintiff.

PATTON & PATTON,

Attorney- for Defendant.

And afterwards to-wit on the 3rd day of February A. D. 1908, the same being one of the term days of the January Term A. D. 1908 of said Sangamon County Circuit Court, the following among other proceedings was had and entered of record as follows to-wit:

NATHANIEL T. KIRBY, Plaintiff,

vs.

CHICAGO & ALTON RAILROAD COMPANY, Defendant.

Assumpsit.

And now come the parties hereto by their respective attorneys and on motion of the plaintiff by his attorney leave is hereby given him to amend his declaration and increase the amount of ad damnum to Five Thousand dollars (\$5000.00) On motion leave is also given the plaintiff to amend the præcipe, summons and account.

11 And the issues herein being fully made up this cause is called for trial, and on motion it is ordered by the Court that a jury come to try the said issues.

Whereupon on call of the Clerk there came a jury of twelve men as follows to-wit:

A. H. Wilson, A. W. Sappington, W. T. Mulligan, James Ellinger, Mike Hagney, Ed. Vancil, Walter Baird, Lindsay Cunningham, Sam Davis, James Gibbons, Arthur Smith, Wm. Miller, Jr., who were duly elected, tried and sworn, well and truly to try the issues joined and a true verdict render according to the evidence.

And the said jury having heard the evidence in part and the time for adjournment having arrived, it is ordered by the Court that the further hearing of this cause be resumed Wednesday morning February 5th, 1908.

And afterwards to-wit on the 3rd day of February A. D. 1908, there was filed in the office of the Clerk of said Sangamon County Circuit Court a certain amended statement of account; which said amended statement of account is in the words and figures as follows to-wit:

Chicago and Alton Railroad Company, to N. T. Kirby, Dr.

An itemized statement of the damages occasioned to said Kirby in the shipment of fourteen head of high class trotters and pacers by breach of special contract entered into January 18, 1906, for the transportation of the same to New York on the "Horse Special" now in suit.

Lou Blake (2), 229¼ by Blake, 213¼ by Mutwood 218¾ Dam Emile conductor by Conductor 214¼, entered in \$17,000.00 worth of stakes and paid up. "Made sick in transportation."

Sold for \$425.00.

Market Value \$2,500.

Damages \$2075.00.

12 Cornelia Bel 210 trotting 217¼ pacing at two year- old, by Onward 225¼ by George.

Wilkes 222. Dam Bel Onward 219¼ by St. Bel 224½ by Electioneer.

Sold for \$2600.00 Market value \$3,000. Damages \$400.00.

Easter Bel trial 224½ by Alberton 209¼, Dam Bel Onward 219¼ by St. Bel 224½ by Electioneer. Bred to Boreal 215¾ Robells by Electioneer.

Sold for \$285.00 Market Value \$325.00 Damages \$40.00.

Woodford Bel trial 228½ by Alberton 209¼ Dam Bel Onward 219½ Bred to Boreal 215¾ by Robells.

Sold for \$325.00 Market Value \$375.00 Damages \$50.00.

Bell Morton by Counsellor 221¼ by Onward 225¼ Dam Bel Onward 219½ by St. Bel 224½ Bred to Boreal 215¾.

Sold for \$225.00 Market Value \$265.00 Damages \$40.00.

Veronique (3) by Cresceus 202¾ The Champion Trotting Stallion of the world. Dam Cornelia Bel 210 by Onward 225¼.

Sold for \$1225.00 Market Value \$1400.00 Damages \$175.00.
 Amt. Brt. Forwd. 2780.00.

Black Filly (3) by Cresceus 202¾ Trotting Stallion (World's record) Dam Woodford Bel by Alberton 209¼.

Sold for \$700.00 Market value \$800.00 Damages \$100.00.

Rythmic Bel (2) record 224¼ by Rythmic 206¼ Dam Cornelia Bel 210 by Onward 225¼.

Sold for \$1000.00 Market value \$3000.00 Damages \$2000.00.

Brown Colt (2) by Red Tell 208¾ by Red Heart 219 Dam Bell Morton by Counsellor 221¼.

Sold for \$200.00 Market value \$230.00 Damages \$30.00.

13 Brown colt by Tregantly trial of 205½ by Simmons 228 Dam Easter Bells by Alverton 209¼ (Weanling).

Sold for \$160.00 Market value \$185.00 Damages \$20.00.

Brown Filly by Tregantly (as above) Dam Woodford Bells by Alberton 209¼ (Weanling).

Sold for \$100.00 Market value \$115.00 Damages \$15.00.

Red Star (trial 220) by Beansant 206½ by Bow Bells. Dam Reply by Princeton 219¾.

Sold for \$220.00 Market Value \$500.00 Damages \$280.00.

Bertha Craven (5) by Guy Corbitt by Guy Wilkes 215¼ Dam Isabel by Aladdin 227½.

Sold for \$250.00 Market value \$290.00 Damages \$40.00.

	4265
To overcharge agreed price of transportation.....	\$29.90
Extra feed, trouble and expense by delay.....	75.00
Total	\$4369.90

And afterwards to-wit on the 4th day of February A. D. 1908, there was filed in the office of the Clerk of said Sangamon County Circuit Court a certain Amendment to Declaration; which said Amendment is in the words and figures as follows to-wit:

Amend Declaration

By striking out after the words "seriously sick" in the fifth line from the bottom of page 2 of the declaration all that follows and adding in lieu thereof the words that by reason of such inferior transportation, delay, sickness etc. said horses did not bring as much on the said market as they otherwise should and would have done, such difference in amount of market price at said time and place amounting to a large sum of money, towit \$4900.00 and in addition plaintiff was obliged to and did pay \$200.50 for such inferior transportation being \$29.90 in excess of the stipulated price under the said contract for transportation aforesaid to the damage of the plaintiff of five thousand dollars therefore he brings this suit, etc.

A. SALZENSTEIN,
 J. M. GRAHAM,
Att'ys for Plaintiff.

And afterwards to-wit on the 5th day of February A. D. 1908, the same being one of the term days of the January term A. D. 1908 of said Sangamon County Circuit Court, the following among other proceedings was had and entered of record as follows to-wit:

NATHANIEL T. KIRBY, Plaintiff,
vs.

CHICAGO & ALTON RAILROAD COMPANY, Defendant.

Assumpsit.

And now on this day come again the parties hereto by their respective attorneys, and the jury in this cause also comes, and the further hearing of this cause is resumed.

And the said jury having heard further evidence, and the time for adjournment of Court having arrived it is ordered by the Court that the further hearing of this cause be resumed tomorrow morning.

And afterwards to-wit on the 6th day of February A. D. 1908 the same being one of the term days of the January term A. D. 1908 of said Sangamon County Circuit Court, the following among other proceedings was had and entered of record as follows to-wit:

NATHANIEL T. KIRBY, Plaintiff,
vs.

CHICAGO & ALTON RAILROAD Co., Defendant.

Assumpsit.

And now on this day come again the parties hereto by their respective attorneys, and the jury in this cause also comes, and the further hearing of this cause is resumed.

And the said jury having heard the remaining evidence and the arguments of counsel thereon, and receiving the instructions
15 of the Court retire in charge of officers of this Court to consider of their verdict.

And afterwards to-wit on the 7th day of February A. D. 1908 the same being one of the term days of the January term A. D. 1908 of said Sangamon County Circuit Court, the following among other proceedings was had and entered of record as follows to-wit:

NATHANIEL T. KIRBY, Plaintiff,
vs.

CHICAGO & ALTON RAILROAD COMPANY, Defendant.

Assumpsit.

And now come again the parties hereto by their respective attorneys, and the jury in this cause having duly considered of their verdict are returned into open court by the officers of this court having them in charge and for their verdict say:

We the jury find the defendant guilty and assess plaintiff's damages at the sum of Four Thousand Two Hundred Dollars (\$4200.00).

And the said defendant by its attorney enters its motion for a new trial.

And afterwards to-wit on the 17th day of February A. D. 1908 there was filed in the office of the Clerk of said Sangamon County Circuit Court, a certain Motion for a New Trial, which said Motion is in the words and figures as follows to-wit:

STATE OF ILLINOIS,
County of Sangamon:

In the Circuit Court, to the January Term, A. D. 1908.

NATHANIEL T. KIRBY

vs.

CHICAGO & ALTON RAILWAY COMPANY.

Motion for a New Trial.

And the defendant, by its attorneys, moves the Court to set aside the verdict heretofore rendered in the above entitled cause, and to grant a new trial herein, and as grounds for such motion, shows to the Court here the following that is to say:

1. The Court improperly admitted on the trial improper evidence offered by the plaintiff.

2. The Court improperly overruled various motions made by the defendant during the cause of the trial to exclude from the jury improper evidence theretofore offered by plaintiff and admitted by the Court.

3. The Court improperly refused to admit proper evidence offered by the defendant.

4. The Court improperly qualified the effect of evidence offered by and admitted on behalf of the defendant by oral statements to the jury concerning the same.

5. The Court improperly refused at the close of all the evidence to instruct the jury to find the issues for the defendant.

6. The Court improperly denied the motion made by defendant at the close of all the evidence to exclude the evidence from the jury and to instruct the jury to find the issues for the defendant, and improperly refused the written instruction to the jury presented therewith, to find the issues for the defendant.

7. The verdict is against the law.

8. The verdict is against the evidence.

9. The verdict is against the law and the evidence.

10. The verdict is against the laws of the United States, and particularly against and in contravention of the Act of Congress of February 4th 1887 and the amendments thereto known as the "Interstate Commerce Act" or the "Act to regulate Commerce."

11. The amount of the verdict is excessive.

12. The Court improperly refused the instructions offered and asked by the defendant, and each of them, being numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12.

17 13. The Court improperly gave to the jury the instructions offered and asked by the plaintiff and each of them, being numbered 1, 11, and 111.

Wherefore, etc.

PATTON & PATTON,
Attorneys for Defendant.

And afterwards to-wit on the 20th day of February A. D. 1908, the same being one of the term days of the January term A. D. 1908 of said Sangamon County Circuit Court, the following among other proceedings was had and entered of record as follows to-wit:

NATHANIEL T. KIRBY, Plaintiff,
vs.
CHICAGO & ALTON RAILROAD Co., Defendant.

Assumpsit.

And now come the parties hereto by their respective attorneys and now this cause coming on to be heard in open Court upon the motion of the defendant for a new trial heretofore entered, and the Court having heard the arguments of counsel thereon, and not being fully advised, takes time to consider.

And afterwards to-wit on the 22nd day of February A. D. 1908, the same being one of the term days of the January term A. D. 1908 of said Sangamon County Circuit Court, the following among other proceedings was had and entered of record as follows to-wit:

NATHANIEL T. KIRBY, Plaintiff,
vs.
CHICAGO & ALTON RAILROAD Co., Defendant.

Assumpsit.

And now on this day come again the parties hereto by their respective attorneys, and the Court being now fully advised, overrules the motion of the defendant for a new trial, to which ruling of the Court the said defendant by its attorneys excepts.

18 It is therefore ordered and adjudged by the Court that the said plaintiff have and recover of and from the said defendant the sum of Four Thousand Two Hundred Dollars (\$4200.00) being the amount of plaintiff's damages heretofore assessed by the jury in this case, as well as his costs, by him herein expended and that he have execution therefor.

To which order and judgment of the Court the said defendant by its attorneys then and there excepts and prays an appeal of this cause to the Appellate Court in and for the Third Judicial District

of the State of Illinois, which is allowed by the Court upon condition that the said defendant enter into bond in the penal sum of Four Thousand Six Hundred Dollars (\$4600.00) to be approved by the Clerk of this Court in seventy (70) days. Bill of exceptions in seventy (70) days.

And afterwards to-wit on the 29th day of February A. D. 1908, there was filed in the office of the Clerk of said Sangamon County Circuit Court, a certain Appeal Bond which said Appeal Bond is in the words and figures as follows to-wit:

Know all men by these presents, that we, the Chicago and Alton Railroad Company formerly Chicago & Alton Railway Company and National Surety Company and National Surety Company of State of Illinois, are held and firmly bound unto Nathaniel T. Kirby in the penal sum of Forty Six Hundred Dollars for the payment of which, well and truly to be made we and each of us bind ourselves, our heirs, executors and administrators, jointly and severally firmly by these presents. Sealed with our seals and dated at Chicago this 2nd day of March in the year of our Lord one thousand nine hundred and eight.

19 The condition of the above obligation is such, that whereas the said Nathaniel T. Kirby did on the 22nd day of February A. D. 1908, at a term of the Circuit Court of Sangamon County, State of Illinois, holden within and for said county, obtain a judgment against the above bounden Chicago & Alton Railway Company for the sum of Forty two hundred dollars and costs of suit from which judgment, the said Chicago and Alton Railway Company has prayed for and obtained an appeal to the Appellate Court of said State of Illinois.

Now if the said The Chicago and Alton Railroad Company formerly Chicago & Alton Railway Company shall duly prosecute said appeal, and shall, moreover pay the amount of the judgment, costs, interest and damages rendered and to be rendered against it the said Chicago & Alton Railway Company in case the said judgment shall be affirmed in the said Appellate Court, then the above obligation to be null and void; otherwise to remain in full force and virtue.

THE CHICAGO AND ALTON RAILROAD
COMPANY. [SEAL.]

Formerly, Chicago & Alton Railway Company.

[CORPORATE SEAL.]

By GEO. H. KOSS, *Vice-President*.

[SEAL.]

Attest:

H. E. R. WOOD,
Ass't Secretary.

Taken and approved by me this 29th day of February, A. D. 1908.

[CORPORATE SEAL.]

NATIONAL SURETY COMPANY. [SEAL.]
CHARLES S. CRAIN, *Resident Vice-President.*
WALTER FARADAY,
Resident Assistant Secretary.

S. T. JONES,
Clerk of the Circuit Court.

Sangamon Circuit Court, January term 1908. Nathaniel T. Kirby v. Chicago & Alton Railway Co. Appeal Bond to the Appellate Court. Filed Feb. 29, 1908 S. T. Jones, Clerk. Patton & Patton, Attorneys at Law, Springfield, Ill.

20 STATE OF ILLINOIS,
Sangamon County, ss:

In the Circuit Court, January Term, 1908.

Filed Apr. 7, 1908. S. T. Jones, Clerk.

NATHANIEL T. KIRBY
vs.
CHICAGO & ALTON RAILWAY COMPANY.

Bill of Exceptions.

Be it remembered that on the trial of this cause at this term of said court, before the Honorable James A. Creighton, Judge presiding, with a jury, the plaintiff to sustain the issues on his behalf introduced in evidence, that is to say:

Stipulation offered in evidence as follows.

STATE OF ILLINOIS,
County of Sangamon:

In the Circuit Court, to the January Term, A. D. 1908.

N. T. KIRBY
vs.
CHICAGO & ALTON RAILROAD COMPANY.

Stipulation as to Certain Facts.

It is hereby stipulated by and between the parties hereto by their respective counsel:

I.

That the defendant did not advise the Michigan Central Railroad Company at Joilet Illinois at any time prior to January 25th 1906

21 that the horses of the plaintiff were consigned from Springfield, Illinois, by the way of Joilet care of Fast Horse Train out of Chicago on Michigan Central Railroad, January 25th, and notice was not given prior to departure of the first train out of Joilet on the M. C. R. on the morning of January 25th.

II.

That Mr. Mohr, Freight Agent of the Michigan Central Railroad Company at Joilet received no notice from defendant of the arrival of the horses at Joilet, until about ten o'clock A. M. January 25th, 1906.

III.

That car No. 6082 A. P. H. Co. containing Mr. Kirby's horses was billed by the Michigan Central R. Co. to 130th st. Station New York.

IV.

That said car arrived at 130 St. Station on the morning of January 29th, 1906.

V.

That Mr. Kirby called at 130th S. Station at about 8 A. M. January 29th, 1906, and signed an order to have the car moved to Fiss, Doerr and Carroll's stables at 36th st. and 11th Ave. and at his request, car was so rebilled.

VI.

That a switch engine was immediately sent for, which engine delivered the car at Fiss, Doerr and Carroll's stable at 12.30 P. M. January 29th.

VII.

That the horses were there unloaded, and were there kept for about twenty-four hours.

VIII.

That the horses were delivered at Fasig-Tipton's stables late in the afternoon of Tuesday, January 30th.

IX.

That proof can be made that the joint interstate tariff rate sheets and official classification which were on file in the freight depot of defendant at Springfield, Illinois, at the time of the making the contract of shipment had been duly filed with the Interstate Commerce Commission and published in accordance with the rules of such commission, and that such proof shall be considered as made.

And it is stipulated that copies thereof may be used in evidence in this cause, without the certificate and seal of the Secretary of

said commission, and that such copies shall not be objected to for or on account of absence of proof of due filing and publication or other matter of form.

Dated this first day of February A. D. 1908.

A. SALZENSTEIN &
J. M. GRAHAM,
Attorneys for Plaintiff.
PATTON & PATTON,
Attorney- for Defendant.

NATHANIEL T. KIRBY being first duly sworn in answer to interrogatories propounded by Albert Salzenstein, Esq., testified as follows to-wit:

Q. State your name to the jury?

A. Nathaniel T. Kirby.

Q. What is your age Mr. Kirby?

A. Sixty One.

Q. Where do you live?

A. In Springfield.

Q. How long have you lived here?

A. I have lived here about four years, between four and five years.

Q. Where did you live previous to coming here?

A. Jacksonville about eleven years.

Q. How long did you live there?

A. About eleven years.

23 Q. Where did you live before that?

A. Jerseyville, Illinois.

Q. How long did you live there?

A. All my life up to that time.

Q. What is and has been your business?

A. Well, sir, I have farmed and developed horses, run a horse shoeing shop, and buy and sell horses.

Q. Explain to the jury what you mean by developing horses, and tell them how long you have been in that business?

A. I commenced developing horses in 1866, and I have worked them for carriage purposes, and racing purposes, such as that, and I have raced horses every year since 1866 but one.

Q. What do you mean by racing and developing horses ever since?

A. Well, I have prepared my own stock, and stock for others for the races, and worked them for show rings, and to make good saleable horses of them, and shipped them to these fancy markets to get the prices.

Q. Have you driven any of these horses you have prepared in races?

A. O. yes, yes.

Q. To what extent?

A. In this same lot of horses?

Q. No, generally, first?

A. O, perhaps half that I handled I handled for racing purposes.

Q. Had you ever shipped any horses previous to this lot to markets?

A. Yes sir, a great many, I think probably six lots to New York previous to this.

Q. Did you ship any anywhere else?

A. Yes sir, Chicago.

24 Q. What kind of horses were those you shipped on those other occasions?

A. Just fancy horses, high priced horses.

Q. Now with regard to these horses, were they entered for any special sale previous to your shipment?

Objection by defendant to the entering.

Q. We will follow that up by showing the agreement; tell the jury in your own way about the shipment of these fourteen head of horses about which this suit is brought in regard to the making of the contract, who it was made with and what was said about it?

A. Well sir, I commenced quite a while previous to the sales that I shipped to New York, to handle, getting the horses ready, they are high priced horses, and there is only just a few horses that are handled always——

Objected to by defendant, that is the general custom of what he does. Objection sustained by the court.

Q. What I ask you Mr. Kirby is, to tell us first what arrangements you made with the C. & A. Railroad Company, or any of its agents, and with whom and how you came to make the arrangement and what it was?

A. It was up on the northeast corner of the square I met Mr. Connor, the ticket agent of the C. & A. road at that time, Will Connors, he says are you busy, I says yes, I am busy getting a lot of horses ready for New York, are you going to New York with them, yes, let us ship them will you, yes, I will ship over your road provided I can make the right arrangements and so on, I want to ship over a road that I can get the horses in as quick as possible, well, let us ship them I says all right, he says I will send Mr. Eggleston over to see you, I said there is no use, Eggleston don't seem to care about my stock or my wants, and there is no use to send him over, he says all right I will send the stock agent I didn't

25 know his name at that time and have him talk the matter over with you, I says all right, and in a few days, probably the next day, Mr. Stuttzman come over and introduced himself as the stock agent of the C. & A. Railroad, he says I come over to see you, Will Connors had me come over to see you, or some agent, that he received notice from them he said to see about the load of horses, I said all right and he says come with me over to the C. & A. Railroad will you, I says yes and I told him that Mr. Eggleston would not give me satisfaction from the fact he was either too busy or did not care or something, and we went over there, and he says now Mr. Eggleston you fix this man out and ship those horses for him and see what he wants &c. and you order a car for

him, I says no, don't you order me a car until you get me a rate. I said I have a rate from the other two roads, the Wabash and the Illinois Central, you get me a rate, he said all right, and I went out of the office. The next day I called up Mr. Eggleston and I says this is Kirby, have you got that rate, and he says I entirely forgot it, I says don't forget it any more for I mean business; the next day I called him up and he says I have got you that rate, I says all right what is it, he says \$170.60 to New York, I says all right, you can order a car, and a few days later Mr. Stuttzman came in and he says to me you are shipping just at the right time Kirby, I says how is that, and I had stated to him I wanted to get on the fast horse train, I understood there was a fast horse train from Chicago to New York, and that I wanted to get on it.

Q. Did you tell him anything about what you were shipping, the kind of horses?

A. Yes sir, I wanted to get on that fast horse train, and I says I have got a fine lot of horses, I have got the best I ever loaded, and the highest priced lot that ever left Springfield, the reason I wanted to go on the fast horse train, I didn't know what they called
26 it at that time, that was the second time I saw him I think, he came into my shop and he says you are shipping just at the right time Kirby, I says how is that, he says well the horse special leaves Chicago Tuesdays, Thursdays and Saturdays of each week, we will ship you Wednesday night just as you have mapped out and get you to Joliet at six o'clock in the morning, he says the train men will pick you up and take you over to Lake on the Michigan Central, and the horse special when it comes along will pick you up at five o'clock I says do I have to say to five o'clock, he says yes and you get onto the fast horse special, I says have you made every arrangement to ship me on that horse special, he says you will go all right, I turned to him and I says if you have not made every arrangement to ship me on that horse special we will go and ship over the Wabash, and I knew that route, he says we will guarantee we will put you on the horse special.

Objected to by defendant. Mr. Stuttzman was no such agent to have power to make such contract, and had no such power either from the railroad company or under the law, we object to the testimony of guarantee, and object to it as a means of proving a contract for the same reason a lack of power under the rules of the company and under the law.

The COURT: No guarantee is charged in the declaration, and the statement cannot be received as tending to prove guarantee, but the court at this time sees no reason why the statement may not go along as tending to prove a contract, to the extent it may ultimately tend to prove a contract, if at all.

To which ruling of the court the defendant by its counsel then and there excepted.

27 Q. You have stated what he said in regard to having made arrangements?

A. Yes sir.

Q. Where did that conversation take place?

A. In my shop.

Q. About what time?

A. Some time I think it was during the Monday, sometime during the day, but I think it was Monday before I shipped Wednesday.

Q. Anybody present during that conversation?

A. Yes sir.

Q. Who?

Q. Charles Seago and my foreman stood close by.

Q. What is his name?

A. S. Gilmore.

Q. Now, after that conversation what was done, if anything, towards making the shipment?

A. They ordered me to get the car loaded at two o'clock because they had to run the car out of the Fair Grounds at four o'clock in the afternoon; we loaded at two o'clock and I went home to get ready. I got my lunch and came back, and came back to the shop between five and six o'clock. I run over to the railroad and did not find Mr. Eggeson in and I went out and found the yard master and asked him what about that car of horses I says for New York; he says where is it, and you are to put me on this train tonight; well, he got up there just in time to put it on the train, and we pulled out in ten minutes after the car got down here, fifteen minutes after the car got down into the yard.

Q. Did you go into the office at all?

A. I went in to get the contract. I asked for Mr. Eggeson when I got in there, and he said Mr. Eggeson is not in, he says who is this, I says Kirby, he says your contract is made out for you to sign, it was partly opened and stuck through the window for me to sign, he says sign that, and then turned it over and says

28 sign there, I says to him are all arrangements made at Joliet about this load, yes he says, it is marked here on this way bill, I says that goes to Joliet, have they made arrangements ahead, he says they have attended to that, so I got the contract and went and got in the car.

Q. Did you accompany the stock?

A. Yes sir.

Q. What time did you and the stock get into Joliet?

A. When we got to where I supposed was Joliet I got up and looked out of the window and saw it was Joliet, I looked at my watch and I saw it was just six o'clock, and the first thing I did then was to make a run over to the restaurant to get a pot of coffee and right back to the car, and I inquired then for the Michigan Central office, at that time in the year and that time in the morning it is pretty dark, not many people on the street, finally a man showed me where the Michigan Central was, there was nobody in, but somebody in the other room, pretty soon the janitor come out making fires, and I asked him where the night man was, he said he was in the yard somewhere, so I went out and went down to the car and stayed there until seven o'clock probably, I think just seven, and I went back to the Michigan Central, nobody in yet, but soon

afterwards the clerks commenced to come in, I asked for the agent, the freight agent, they said he would be in soon and I think he arrived somewhere about eight o'clock, and I told him my business, and I says when are you going to get me over to Lake.

Objection by defendant to any conversation between the Michigan Central Agent and Mr. Kirby, as being entirely outside of the controversy here.

Mr. SALZENSTEIN: Excepting in so far as to find out whether any arrangement had been made by the C. & A. with the Michigan Central about this stock.

29 Mr. PATTON: That is in the stipulation on file.

Mr. SALZENSTEIN: Now Mr. Kirby, you say you saw Mr. Mohr the freight agent for the Michigan Central at Joliet?

A. Yes sir.

Q. Did you say anything to him about this car of yours?

Objected to by defendant.

Q. I am not asking what was said, but if he said anything about it?

The COURT: What is the purpose of it?

Mr. SALZENSTEIN: To find out whether or not, the purpose is to show what was said to Mr. Mohr about this car and what arrangements were found made towards getting this car on its way.

Mr. PATTON: We object to it as wholly immaterial.

The COURT: I suppose you want to show he learned from Mr. Mohr that no arrangement had been made for taking care of this stock, is that the idea?

Mr. SALZENSTEIN: Yes, that is what I want to show.

The COURT: The plaintiff, may without giving the details of any conversation with Mr. Mohr, disclose whether he learned from Mr. Mohr that no arrangements had been made or notice given, then he may go along and tell what he and Mr. Mohr did after that point.

To which ruling of the court the defendant by its counsel then and there excepted.

Q. You may state whether or not you learned from Mr. Mohr whether any arrangement had been made or notice given by the C. & A. in regard to the shipment of this stock on the fast train to Joliet?

A. I did sir.

Q. What was said by him to you in regard to that matter?

Objected to by defendant. Objection sustained by the court, the court remarking he may state what he learned.

Q. What did you learn from him as to whether arrangements had been made?

A. I learned that he had never been notified about this car, or never knew anything about it, where it came from, whose it was or where it was billed to, I learned that from Mr. Mohr.

Q. Now did you state to Mr. Mohr where this car was to go?
A. Yes sir.

Q. After you made that statement to Mr. Mohr what did he do, if anything, towards taking steps to forward this car?

A. I stepped out and got a friend of mine, and he come in and introduced me to Mr. Mohr, and he says Mr. Mohr, help this man out, he is a friend of mine and he says I will do it.

Objection by defendant to the conversation.

The COURT: The details of the conversation are not material.

Q. You need not go into details, tell what Mr. Mohr did, if anything?

A. He stepped out and tried to get an engine, an extra one to take me over, I says I will pay you for it if you can get it.

Objected to by defendant. Objection sustained by the court.

A. He come back in and he says there is but one engine here and I can't let that go; now I says can't you get me on a passenger train, he says I will try it, and he did work with them to get me on a passenger train, but the objection was that there was no hot air pipes through this car, and it could not be put on a passenger train, he says you are a day late, we got that car too late to put it on that train, that takes water at the station over to Lake, therefore we will have to put you on a freight train and take you there, the freight that comes at six o'clock in the afternoon.

Objected to by defendant, and ask that the latter part of the statement as to what Mr. Mohr said be stricken.

The COURT: The objection is sustained, the valuable part of this, if there is any value to it, is that this man was making efforts to get his stuff away, and he may tell what he did and what Mr. Mohr did without going into the details of the conversation. Mr.

31 Mohr was not your agent and this man was his own servant, and he must exercise diligence from the time he got notice even on his theory of the case.

Q. Now when did you leave Joliet on your way to Lake?

A. At six o'clock that evening, Thursday evening about six o'clock.

Q. What time did you get to Lake?

A. I think it was just twelve o'clock at night, midnight.

Q. At what time did you leave Lake on any train on the Michigan Central?

A. I think we was picked up at two o'clock in the morning.

Q. The morning of the 26th?

A. The morning of the 26th, yes sir.

Q. And how did you proceed along?

A. Well sir, part of the time we were running, part of the time we was not.

Objected to by defendant as having no relevancy or materiality on the charge of this declaration, as to any negligent or improper management of the train of the Michigan Central Railroad Com-

pany, whether part of the time they were running and part of the time were not.

The Court: The declaration charges that he had a special agreement with the defendant, that they should connect his car with this Michigan Central at Joliet, and he charges the breach of that contract, and that damages resulted from that breach, now I don't see any impropriety in his disclosing in what manner damages resulted from that breach, it seems to me if his theory of the case is sound in law or fact, up to this time it is proper for him to disclose how his stock was treated, what the details were, if there were details, I am inclined to think the objection is not well taken.

To which ruling of the court the defendant by its counsel then and there excepted.

32 Q. Tell in detail how the train was proceeding?

Objected to by defendant. Objection overruled by the court. To which ruling of the court the defendant by its counsel then and there excepted.

A. The train stopped of course, they put me on the meat train, and they stopped at every large city from Lake to New York to ice up on the meat train.

Q. How long would it stop when it stopped?

A. O, at different times, it stopped different lengths of time, for instance at Windsor, we got there at noon, and they run me out at about six o'clock at night, they run me over to East Buffalo, and we stayed there from one o'clock until six o'clock in the evening before we started out.

A. One o'clock in the afternoon?

A. Yes sir.

Objected to by defendant, this declaration is a declaration for breach of a special contract to catch a special train now we cannot be held to account for such non-proximate result as that this train was negligently handled the train he actually did catch was negligently handled.

The Court: You don't quite grasp the idea I had in mind, he charges a breach of what he says was a special contract to get his car to Joliet in time to connect with the Michigan Central Fast Horse train, now he discovers when he gets to Joliet there is a breach of that contract; now from that time forward he has got to exercise the very best diligence he can to get his stuff on with as little loss as possible, so he may tell what efforts he made to go forward, and what obstructions he met with in his efforts, and ultimately if his case is sound in both law and fact, ultimately

33 what loss resulted from it, it seems to me it is in the field of competent evidence. Primarily you are not responsible for any negligence of these other roads, but if his case is sound in both law and fact and he is doing the best he can to make the loss as little as possible, and loss does follow, he must show two things, first, that he is doing the best he could and by reason of things he

could not control loss did follow that of course makes it necessary to tell the obstructions he met with in his progress.

Mr. GRAHAM: We are not claiming the management of this meat train was negligence at all, we are proceeding rather on the theory he had the right to go on the horse special and we have a right to show how he went, and we have a right to show how the train we had to take went.

The COURT: That is the theory on which I am ruling, attempting to show you did the best you could when you discovered that the contract was broken and that in taking this train you had to submit to these delays. I am admitting it upon that theory, I am not letting it go to the jury upon the theory of negligence, but it was the best way he could get to go.

To which ruling of the court the defendant by its counsel then and there excepted.

Q. Now why was the delay, you say you left in the evening?

A. Yes sir.

Q. What day was that?

A. I think that was about Saturday, I won't say whether Friday night or Saturday.

Q. Well now from East Buffalo was there any delays?

A. Yes sir.

Q. Where?

A. We laid up from Sunday about noon until eight o'clock at night at Albany.

Q. And from Albany was there any other delay?

34 A. Yes sir, quite a delay at Schenectady.

Q. How long did you lie up there?

A. I don't know just how long, I think about four or five hours to the best of my knowledge.

Q. Then what time did you get into Schenectady and what time did you leave?

A. I can't remember that, I just remember they stopped, &c.

Q. What time did you get into New York, 130th street?

A. Between seven and eight o'clock in the morning Monday morning January 29th.

Q. Explain this matter of 130th street?

A. I will explain that when they made out my bills of the Michigan Central at Joliet I says we are to ship to 33rd street, and they said 130th street, I said do you know, and they said yes, we have billed other cars there several times, I says I don't know but it strikes me—

Objection by defendant to this conversation with regard to rebilling this stock at Joliet with which we had nothing to do.

Mr. SALZENSTEIN: It is stipulated when this car reached 130th street sometime in the morning of the 29th it was sent forward from 130th street to the stables of Fiss, Doer & Company. Now we want to show how it came to be sent to 130th street instead of being sent to Fiss, Doer & Company stables, to show we were not negligent is all.

Mr. PATTON: We think it is entirely immaterial to us, we were not negligent in any respect that caused this stuff to be billed incorrectly, our billing shows proper billing.

The COURT: I think it is material on the theory we are proceeding on for him to show he exercised all diligence and care he could.

To which ruling of the court the defendant by its counsel then and there excepted.

Q. Well, what did you say as to the place they were to be shipped?

35 A. I said I don't know now what the number is, but put Fiss, Doer & Carroll in that bill and it will go to his stables. I always ship to his stables and unload, they said they didn't know such place but we will put it on. I says put Fiss, Doer & Carroll, he says we will ship them all right, but he didn't put it on, immediately when I got into New York at 130th street I found I was four or five miles from Fiss, Doer & Company and I immediately went to the office and told them I should have been put to Fiss, Doer & Carroll and thought I was going to land there, he says no, it is four miles away and you will have to rebill down there and it will cost you sixteen dollars, I says I have got a sick horse and get me down there as soon as possible, and they got me down there at 12.30 to Fiss, Doer & Carroll's stables, unloaded me at 12.30 that day.

The COURT: With reference to that testimony the court holds it admissible only as tending to show he was exercising diligence on his part to forward his horses to the most convenient point in the shortest time, for that purpose only it is admitted.

To which ruling of the court the defendant by its counsel then and there excepted.

Q. Explain whether the charge of \$16.00 they made a reduction upon it?

Objected to by defendant.

Q. The purpose is to show it is no part of this \$29.90 which he charged this railroad as excess charges.

Objection overruled by the court. To which ruling of the court the defendant by its counsel then and there excepted.

Q. Tell whether or not this \$16.00 was deducted from the bill or not?

A. It was.

36 Q. Do you know the amount paid for the shipment from Springfield to New York to these stables?

A. \$200.50.

Q. Mr. Kirby tell the jury the condition of those horses when loaded, and in what condition they arrived in New York later on at Fiss, Doer & Company's stables?

A. We loaded them here in as nice condition as I ever saw horses loaded in. I helped load other horses and I never saw horses in a nicer condition, there wasn't a sick horse in the train.

Q. What condition were they in when put on the train in Springfield?

A. Excellent condition as far as I could see, not a thing wrong with them.

Q. Go ahead, what condition were they in at Joliet?

A. The horses were in good condition at Joliet.

Q. What condition were they in when they left Joliet?

A. The horses appeared to be in good condition when they left Joliet.

Q. Tell the jury in what kind of a car they were loaded here and carried on to New York?

A. What is called a Burton Arms palace car, sixteen stalls, a stall for each, I had fourteen horses in it and two stalls vacant.

Q. How was the car arranged for feeding and watering the horses?

A. There is a trough in front of each four horses, each division that we feed in, a malleable iron trough that they feed in and we have water on the car underneath the car that we dip up and water the horses.

A. How much room was there in the car for the horses to move around in?

37 A. Where the horses stood four abreast there is about I should think two feet and a half for each horse, each partition, they are partitioned off.

Q. Partitioned are they?

A. Yes sir, all partitioned off.

Q. And four horses in a partition?

A. Yes, except the two middle tiers, there are only three horses in each one of them.

Q. How much room did they have?

A. It gave them a little more room for I set the partitions over and divided it up so we could just walk back and forth there, they probably had three foot, each one of them.

Q. What condition were those horses in when they reached Lake?

A. As far as I could see all right when they reached Lake.

Q. What examination did you make of them?

A. I simply fed them when it come time and watered them and saw they were all right.

Q. When did you notice, if you did notice anything wrong with any of them?

A. The first that I noticed of any consequence in the horses was when we — standing at Albany Sunday afternoon, my attention was called to Lou Blake who seemed to be quite sick.

Q. Do you know what seemed to be the character of her sickness or ailment?

A. She seemed to have caught cold it acted something like pneumonia or something of that sort.

Q. What was the condition of the other horses?

A. Some of them was pretty fair, and others were very tired,

38 especially my young ones the youngest, they got very tired so that they fell down and we had to get them up standing so long, and there was one or two others that were acting like they were quite sick, but nothing serious like Lou Blake.

Q. What was the condition of those horses at Schenectady Lou Blake and the other horses, what was Lou Blake's condition?

A. Now at that point I don't know that I could state.

Q. Well, what was her condition and the condition of those other horses when they reached 130th street?

A. Just as I told you, very tired and worn out, and this mare getting sicker and sicker all the time.

Q. What was the condition of the horses when they reached Fiss, Doer & Company's stables at 12.30?

A. Just the same as I have mentioned, very much worn out, tired out.

Q. What was the condition of Lou Blake?

A. Very sick, very sick.

Q. What did you do if anything for her?

A. I had a veterinary called immediately.

Q. What was his name,

A. I just forget his name McCoullough I think.

Q. The one that testified by deposition?

A. Yes sir.

Q. And how long did the horses stay at this stable?

A. I landed there at Monday noon, and we took them out of that stable at about seven o'clock led them out a mile a mile and a half, which took us about an hour, we got in at eight o'clock at the Garden, eight o'clock Tuesday night.

Q. Now in making your contract with the railroad company was anything said about the Madison Garden sale of any kind?

A. I never tried to ship a lot there that I didn't tell them I was shipping to Madison Garden sales.

Objected to by defendant. Objection sustained by the court.

39 Q. In your talk with Mr. Stuttsman?

A. Yes sir.

Q. What was said about that?

A. I said to him I want to ship the quickest way I can, this is a high bred load of horses, and I want to get there as soon as possible, it was a big sale, and I had to sell just when I catalogued to sell.

Q. Get there, did you say where?

A. Get to Madison Square Gardens.

Q. What arrangement had you made, if any, previous to that time, for the sale of these horses at Madison Square Garden, and how are arrangements made for sales of that kind?

A. We have to ship, I mean we have to get our pedigrees and a statement of each horse &c. in at a certain time, probably twenty days before the sale, in order that we shall be published.

Objected to by defendant, we had no knowledge, or the company had no knowledge of any such details as these, and it cannot be

charged by way of special damage or otherwise with details concerning which we had no information.

The COURT: Is it not sufficient to show that he had done that, that he had catalogued and had his horses for sale on a particular day?

Q. What arrangements had you made and were made about the sale of these horses at Madison Square Garden on that day?

A. I had made arrangements to sell these fourteen head of horses, also arranged for my dates to sell the horses at the Garden, not to sell later than Wednesday.

Q. Now what arrangement if any had you made as to when those horses were to be placed in the Garden?

A. None whatever, first come first served.

40 Q. What do you mean by that?

A. I mean if I had gotten there on time I would have been one of the first ones in the Garden, then I would have had my horses on exhibition all the time up to the sale.

Q. What effort did you make to get those horses in the Garden when you reached New York at 12.30?

A. I went immediately to the Garden and applied for stalls and they said everything was full and I would have to wait until they sold out a lot of them before you can get in.

Q. What was the earliest time you could get them into the Garden?

A. Sunday.

Q. No, after they reached New York on Monday when was the earliest time you could get them into the Garden?

A. Tuesday night at eight o'clock.

Q. What advantage if any was there in getting them into the Garden as early as possible?

Objected to by defendant on the ground that they are seeking to prove special damages here, and in order to prove special damages notice of all the factors which will bring about such special damage must be brought home to the railroad company prior to the shipment, and there is no proof nor can it be proven as I understand that anything was said to this railroad company about getting them there in time to exhibit to prospective purchasers, I think Mr. Kirby has testified that he did not, that he said they were to be sold on the 29th that is the only notice we had of any special circumstances governing this sale, and to go ahead and prove if he had gotten them there on a previous day he might have showed them to an admiring circle of horse men is not competent evidence in this case.

41 The COURT: Do you claim damage other than to the market price of the horses

Mr. SALZENSTEIN: By reason of such delay in transportation all of said horses were damaged, we merely say by reason of these things.

The COURT: You don't charge any special damages for not getting them into the Garden in time.

Mr. PATTON: There is the further objection to that question, some advantage in getting them there in time to groom them up for a particular sale.

The COURT: I am disposed for the present to take this view of the case under this declaration, and sustain this objection to treat this market as a market and let it be disclosed what time the stock got there, what condition they were in when they did get there, and let it be shown if it can be how much less they brought than if they had been in fair condition, simply treat this as the market, without attempting at this stage of the case at least to go into the question of what could be gained by having them there ahead of time and advertising them and all that kind of thing, treat this as you would the Union Stock Yards at St. Louis I am absolutely unable to make connection between the averments in this declaration and special damages for not getting them into the Madison Square Garden sale, I can easily see and am willing to proceed with the proof that they reached there in this damaged condition, and that they were put upon the market in the best condition you could put them in in the time they were had and were sold, and show the damages. It may go along on the theory I understand the declaration. The objection is sustained.

Q. Were those horses sold on the day they were advertised on this Wednesday?

A. Yes sir.

Q. What loss if any was there in the prices those horses brought and would have brought had they been in proper condition at that sale?

42 Objected to by defendant. Objection sustained by the court.

Q. Take the mare known as Lou Blake was she one of the horses in that shipment

A. Yes sir.

Q. She is the animal you have spoken of as being sick?

A. Yes sir.

Q. What was her condition at the time of the sale as to being sound?

A. Very sick and in the veterinary's care.

Q. How did she acquire that sickness?

A. On the train.

Q. In what way, explain that to the jury so they will understand it?

A. Well, when they are standing they are very uneasy, the cars standing they are very uneasy, they got to kicking and fighting, especially when they got tired, as soon as the car starts up there is a sort of draft that you can't keep out of the car, that probably caused her to take cold.

Q. Being uneasy and rolling around and kicking what effect has that upon the heating of the body, if any?

A. They warm up just the same as if they were out trotting.

Q. This mare, had she been in condition, not tired or worn out or sick with cold as she was, what would be her fair market value at that time at that place?

Objected to by defendant, the witness has not qualified.

Q. Mr. Kirby, I think you stated you had a number of sales at New York of this sort?

A. Yes sir.

43 Q. How many sales did you attend at Madison Square Garden?

A. I think seven.

Q. When are those sales held?

A. They are held in November and the last of January and first of February.

Q. Of each year?

A. Of each year.

Q. How many sales are there in a year?

A. Two there.

Q. Have you attended any other sales?

A. Yes sir.

Q. Where?

A. At Chicago.

Q. What familiarity have you with the prices brought by horses at those sales?

A. Well, I certainly have a pretty good idea or I would not——

Q. Besides attending these sales and seeing the prices horses bring, have you any other means of knowing what prices horses bring at those sales?

A. Yes sir.

Q. What is that?

A. By selling them and seeing them sold.

Q. Well, is there any other opportunity besides that, do you see the Horse Journal?

Objected to by defendant as leading. Objection sustained by the court.

Q. Is there any other means of ascertaining when you do not attend personally the prices the horses bring?

A. I certainly look over the papers and see what horses sell for, and their breeding and everything of the sort, that is what posts me, the journals.

44 Q. What has been your habit in paying attention to those things for the last ten or fifteen or twenty years?

A. Well, it is certain breeding and feed and everything of that sort that goes to make up the price of the horse in addition to the formation.

Q. What have you done if anything towards posting yourself as to what horses bring at those sales where you have not been present in person?

A. Reading of sales that were made, and of the different horses that I knew.

Q. Are you familiar with the prices that horses of this kind bring at New York at these Madison Square Garden sales?

A. Yes sir.

Q. What in your opinion would this mare Lou Blake 2 have brought had she been in sound condition, not tired and worn out,

and not suffering with cold at that sale at Madison Square Garden held on that day January 26th 1906?

Objected to by defendant, simple familiarity with sales four and five months apart is not sufficient to show he had familiarity with conditions surrounding those sales, or market price or market values of animals of this class at this particular time, if he had been at a sale in November—When was the last sale Mr. Kirby that you were at in New York before this?

Mr. KIRBY: It was a year, it was two years before this sale.

Mr. PATTON: To make this man to qualify him as an expert on market values, or his being competent to testify on market values by authority of his attendance at sales two years before, without knowing what the conditions of that sale were would be it seems to me highly improper.

The COURT: The objection is overruled, he says he has kept posted on the market all the time through the papers and journals like anybody else does. I think it is competent, I think he comes over the line into the field of expert on these things, it is not
45 for me to say how much of an expert. To which ruling of the court the defendant by its counsel then and there excepted.

Mr. PATTON: I desire to object again on the ground that the damages accruing out of a failure to realize a high price at such a sale are purely speculative.

The COURT: I think the form of the question is bad, I think the question would be, what was her fair market price in that market at that time.

Q. What would be the fair market value on that market at that time, if she had been in proper condition of Lou Blake 2 had she been in sound condition, not having the cold you have spoken of, and not worn out?

A. \$2500.00.

Objected to by defendant, and ask to have it excluded on the ground it appears from this gentleman's testimony he has no sufficient knowledge of the market, and that the answer is an answer as to purely speculative values, and not market values, in as much as the answer is predicated on a particular sale and particular conditions surrounding this sale, of which the defendant in this case had no notice or knowledge prior to the shipment.

The COURT: The objection is overruled, the court is of opinion that this witness has sufficiently qualified as to make it the duty of the court to receive him as an expert on market price, and that the other points raised by counsel are questions for the jury as to the weight of the evidence of the witness, and not questions of law for the court.

To which ruling of the court the defendant by its counsel then and there excepted.

Q. Now amongst the shipment I call your attention to a horse called Rythmic Bell. I withdraw that question; what did this mare Lou Blake 2 bring at the sale at that time and place?

A. \$425.00.

Q. Now I call your attention to the horse called Rhythmic Bell 2.

46 Mr. PATTON: I don't like to interpose objections all the time but I want to keep the record, what she actually did bring, what this man actually sold her for is no criterion of what she was worth at that time, whether he has honestly and fairly lost on that account, he may have sold her collusively, there may have been other conditions than the condition of her health.

The COURT: His statement of what she did bring is allowed to stand, but it must be supported by some evidence tending to show that she brought the fair market price in that market at that time, for her in her condition.

To which ruling of the court the defendant by its counsel then and there excepted.

Q. What do you say as to whether or not she brought her fair market price in her then condition at that time and that place?

A. I think she did, for she was very sick.

Q. Tell the jury in what manner she was sold?

A. I sold her sick, just as she stood, I said she is in the veterinary's care, and there she is.

Q. How was she sold, tell the jury, explain to them the mode of selling at that market, how the market price was arrived at, what was done?

A. Just simply by moving her a little.

Q. Moving her where and *who*?

A. In the track they have in the Madison Square Garden.

Q. Tell the jury about those tracks and how horses are sold there?

A. The track is up above the horses, the horses beneath, whenever a horse is brought up he is brought up in front of the judges' stand, and an announcement made before they are sold or moved up, then you move them up to show whether they move or

47 not, this mare was in such condition that we didn't move her scarcely any, we could not, I said there she is, she is sick, but I guarantee the horse, you have got to guarantee.

Q. What was done about outcry if anything who did the selling?

A. Fasig, Tipton & Company.

Q. Who did it, the man?

A. Their auctioneer, Mr. Bain.

Q. What did he say about this mare?

A. He says you hear the statement about this mare, you see how she is bred, the amount of stakes she has entered in.

Q. How she is bred?

A. Yes, sir.

Q. How would they see how she was bred?

A. From the catalog, there is the paper.

Objection by defendant to the reference to the catalog, and object to her breeding: here are large special damages claimed against this company for a failure to get certain animals at a certain market

at a certain time, and in good condition; as I understand the declaration in order that any damages special in their nature, owing to the individuality of the animal or owing to the environment, while they may be proven, it must be first shown that notice was given to the carrier of the special circumstances concerning both the individual and environment.

The COURT: I don't agree with you in that position for the purpose of testing whether an animal brought its worth or not at public sale it may be shown what virtues of the animal the auctioneer cried to the People, and it is not so material what they were as what

48 they were represented to be and what they were understood to be, if he witheld any strong points you might say as you stated a moment ago she sold for \$425 by collusion, but if he proclaimed her strong points, and tend to show a fair sale, and that the price she brought was on account of her apparent condition of health rather than otherwise.

Mr. PATTON: In order that I may be understood, my position is may it please the court, that when special damages are claimed against the carrier arising out of special circumstances of individuality of shipment, or out of a special reason why a shipment should get to a place at a certain time, the environment surrounding that sale, the carrier preceding that shipment, in order to be charged with this extra liability, must have notice of all these special circumstances, that is to say, if I have a threshing machine that is out of order, and it is necessary that I have a part for that threshing machine in order to carry on my business, and I deliver at Chicago to the railroad company that part without giving notice to the railroad company of the special reason why that part is necessary to be delivered to me in a represented time, or what that part is, the railroad company is justified in feeling it is just an ordinary threshing machine part, and no circumstances making it necessary that that ordinary threshing machine part should be delivered within a special time for a special purpose, and I say there is no proof here of any such notice to the initial carrier as will permit proof of these special circumstances for the purpose of raising special damages.

The COURT: That is what I assume you are driving at, but it has no application to the state of case now before us, the case is being tried on this proposition that *that* these horses were

49 shipped to New York to arrive there for market at a certain time, that they arrived there in such condition that they brought less money than they otherwise would have brought in that market, that is all there is to it, and it does not seem to me any question of law to limit the plaintiff, no question of law that requires me to rule how much the stuff was worth and how much it was damaged.

To which ruling of the court the defendant by its counsel then and there excepted.

Q. What was that catalog you referred to?

Objected to by defendant.

The COURT: He may state what the auctioneer said.

To which ruling of the Court the defendant by its attorneys then and there excepted.

Q. What did the auctioneer state about the catalog?

Objection by defendant to what the auctioneer stated about the catalog.

Q. In the presence of these buyers?

The COURT: I am trying to hold if Albert could hear and *Ull* understand, I am trying to hold such things as were done there as tend to show whether the sale were done there as tend to show whether the sale was fair or unfair sale is competent evidence.

MR. PATTON: We don't object to that, but we object to lugging the catalog in by the ear, that is what we object to.

A. The auctioneer is well versed in pedigrees, he says this is Lou Blake two year old, record 29 $\frac{1}{4}$ entered in \$40000 worth of stakes, and bid up, she is sold as she stands, she is sick, in 50 the veterinary's hands right here, do you want to move her up, I says yes move her up, and we moved her up a little and brought her back and sold her, sold her as sick, and stated her pedigree; if he is well versed in pedigrees he don't have to look at the catalog.

Q. How many bids were there?

A. I think probably two or three only.

Q. Now before we leave that tell the jury how many people were present at that sale?

A. Well I should judge twenty five hundred or three thousand people.

Q. Where is Madison Square Garden and how is it situated?

A. Well, I forget the street it is on, probably 26th street, and it occupies a block.

Q. How is it arranged for seating people who want to buy and see the horses, and how towards showing the horses?

A. It is arranged with seats like opera houses, to carry on shows of different sorts there, the track is made just inside of those seats, the seats from one round of the track, and a fence on the inside of that, about twenty five feet wide, and the horses are exercised around that track, it is of the shape of a regulation track with ridges at the sides thrown up on the turns.

Q. How are those seats built with reference to those at the fair grounds?

A. Built one above the other.

Q. Built in tiers all overlooking the track.

A. Yes sir.

Q. Now was there a colt in that shipment called Rythmic Bell 2?

A. Yes sir.

51 Q. What was his condition when he reached New York, and what was his condition attributable to?

A. He was sore and tied up, and it was caused by the long, tedious shipment.

Q. Was he put on sale at this market on this day?

A. Yes sir.

Q. What was his fair market value on that day and at that place in the condition that he was in?

A. Well, he could not show anything, he was all tied up, he could not step out a bit, all tied up and sore, and I was surprised at the price he did sell in his condition.

Q. What was that price?

A. \$1,000.

Q. How was that sale made?

A. Just the same as Lou Blake, only stated this is Rythmic Bell you see how he is bred, and you see the colt, apologized for the condition he was in by being tied up and sore on the train, we moved him as well as we could and sold him.

Q. What was the fair market value of that colt at that time and place had he been in good condition?

A. \$3000.

Q. In that consignment was there a mare called Cornelia Bell?

A. Yes sir.

Q. What was her age at that time?

A. I think she was eleven years old.

Q. What was her condition at the time she reached New York?

A. Similar to the others, this was a double gaited mare, and it had a great effect on her, when one of these are sore by a shipment they don't extend themselves and step out and trot, she was a trotting mare. I remember she got a mark of 10 trotting, and it had a great effect on her, she was double gaited.

Q. What would that mare have brought at that sale at that time had she been in sound and good condition?

The COURT: What would have been her fair market price on that market.

Q. What would have been the fair market price of that mare at that time and place had she been in good sound condition?

A. From her breeding, her record and her constant performance in the Grand Circuit that mare was worth \$3500.

Q. What was her fair market price at that time and place in the condition she was in?

A. Well, I think when they cannot show up the fair market price is what they sell for right there.

Q. Well, what was that?

A. \$2600.

Objection by defendant to the answer of the witness and ask that it be excluded, as the plaintiff states he bases it on the selling price and not on the market value.

The COURT: A portion of his answer is entirely irrelevant, if he would listen and answer we would have little trouble; I understood him to say her fair market value as she was then, was at that time and in that market, was \$2600. He said a whole lot more than that, but I understood him to say that, is that right or not?

A. Yes sir.

The COURT: That much of it may stand all the balance is stricken

out. To which ruling of the court the defendant by its counsel then and there excepted.

53 Q. In that consignment was there a horse by the name of Easter Bell?

A. Yes sir.

Q. What was his condition at the time he reached New York, the time he was shown at the sale?

A. Well, I would have to say simply worn out by the trip.

Q. What do you attribute that condition to?

A. The long tedious trip.

Q. What was the fair market value of that horse at that time and place had he been in good condition?

A. Was that Easter Bell?

Q. Yes?

A. I don't really know whether I can remember the exact amount of each horse.

Q. I am not asking you what he brought. I ask you what his fair market value at that time and place was, had he been in good condition?

A. Well, she was a high bred mare——

The COURT: Answer the question if you can.

Q. What in your opinion?

A. \$500.

Q. What was the fair market value of that horse at the time and place in the condition she was in at the time, what was the fair market value of this mare at the time and place and condition she was then in?

A. I would not exactly know how to answer that, except what she sold for. I would not know how to answer that except the price that she bought.

Q. What was that price?

A. I don't know as I just remember what that price was.

Q. If you made a memorandum at that time?

A. I did, yes sir, in the catalog, \$285.

54 Objected to by defendant on the ground that they are confined by their bill of particulars, and it is alleged in their bill of particulars she was worth \$325 market value.

The COURT: Well they are bound by their bill of particulars.

Mr. SALZENSTEIN: That is not a bill of particulars, it is a copy of the account sued on, I don't know as we are confined in a copy of account to the exact market value.

The COURT: You would not be allowed to claim a greater amount of damage on this animal than you claim in your bill of items.

Q. How was the sale conducted in the case of this mare?

A. Just the same as the others, led them, moved her.

Q. And how was the sale conducted in the case of the other mare?

A. Just moved her in front of the pony with the harness on.

Q. In this consignment was there an animal named Woodford Bell?

A. Yes sir.

Q. Was that a mare?

A. Yes sir.

Q. What was her condition at the time she reached New York and at the time she was sold at the Madison Square Garden sale?

A. Similar to the others.

Q. How was she sold?

A. Just the same as the others, in front of a pony.

Q. Now if this mare had been — good condition at that time and place what was her fair market value in your opinion?

A. My idea just the same price for them makes \$500 a piece.

Objected to by defendant, the bill of particulars for — states \$375.

The COURT: So long as the bill of particulars for him — the damages cannot be in excess of the bill of particulars, but
55 prove whatever you can.

Q. What in your opinion was her fair market value at that time and place?

A. Well, I would not know how to answer that, only as I answered the other.

Q. Well, what did she bring?

A. That is the price she brought——

Q. What was it?

A. I don't know without looking at the catalog.

Q. If you made a memorandum at the time?

A. I did, right there, yes sir.

Q. What was it?

A. \$325.

Q. In that consignment was there an animal named Bell Wharton?

A. Yes sir.

Q. Was that a mare?

A. Yes sir.

Q. What was her condition at the time she reached New York and at the time she was shown at the sale?

A. I didn't notice any difference in her from the others, the same condition, tired.

Q. What was that condition due to?

A. The long, tedious shipment.

Q. What in your opinion was the fair market value of that mare at that time and place had she been in sound condition?

A. Well sir I would say \$500 anyway.

Objected to by defendant, the market value stated in the bill of particulars is \$265.

Q. How was she sold?

A. Just the same as the others, with the harness on in front of a pony, we moved her as much as we could.

Q. What did she bring?

A. She brought \$225.

56 Q. Was there an animal in that consignment by the name of Veronique?

A. Yes sir.

Q. What was that, a mare, horse or stallion?

A. A mare.

Q. What was her condition at the time she reached New York and at the time she was sold?

A. It didn't seem to affect her as much as it did the others, and shipped in a little better form.

Q. Was she affected in any way by that?

A. Well, somewhat sore.

Q. Did that have any effect on her market value?

A. O. yes, she could not show the speed she otherwise would.

Q. What in your opinion was her fair market value at that time and place had she not been in that condition, and sound and all right?

A. Well, I would fix her price at \$1,500.

Objected to by defendant on the ground the bill of particulars shows \$1,400.

Q. What did she sell for?

A. \$1,225.

Q. Was there a black filly by Cresius in that consignment?

A. Yes sir.

Q. What was the condition of that black filly at the time she reached New York and at the time she was sold?

A. It didn't affect her as much as it did some of the others.

Q. Did it affect her any?

A. She could not show the speed she did here at home, she seemed to be tied up.

Q. What do you mean by being tied up?

A. Well, sore all over, they don't extend themselves.

Q. Did that have any effect on her market value at that time and place?

57 A. Oh, yes, you have got to show any animal.

Q. What in your opinion would have been her fair market value if she had been free from this condition and in sound condition at that time and place?

A. Well, knowing this filly as I did I would put her price at \$800.

Q. What did she sell for?

A. She sold for \$700.

Objected to by defendant to the answer "knowing this filly as well as I did" showing very plainly the witness is not testifying to market value but from price of affection.

The Court: Strike that out.

Q. I ask you about her then market value at that time and place.

The Court: As people there would see her, not what you know about it.

A. I would say \$800.

Q. At that time and place had she been over this condition you have spoken of?

A. I say \$800.

Q. Now was there in that consignment a brown colt by Red Tell?

A. Yes sir.

Q. What was the condition of that colt at the time it reached New York and the time it was offered for sale at Madison Square Garden?

A. Well, his condition was not so bad as some of the others were in, he showed fairly well.

Q. Was there anything the matter with him produced by that trip?

A. Nothing only soreness from shipment.

58 Q. Did that have any effect on the market price at that time and place?

A. Yes, because it had an effect on his speed.

Q. What in your opinion was the fair market value of that colt at that time and place had he been free from that condition you have just spoken of?

A. Well, \$400.

Objected to by defendant on the ground the bill of particulars shows a market value of \$350.

Q. What did this colt sell for?

A. He sold for \$300.

Q. Was there in that shipment a bay filly by Red Toll?

A. Yes sir.

Q. What was the condition of that filly at the time it reached New York and the time of this sale?

A. Pretty fair condition.

Q. Did it suffer in any way by this long shipment?

A. Simply tied up by being somewhat sore.

Q. Did that affect its market value at that time and place?

A. O, yes.

Q. What in your opinion was the fair market value of that bay filly at that time and place had it been in sound condition?

A. \$250.

Objected to by defendant on the ground that the bill of particulars contains here a value of \$230.

Q. What did she sell for at that time and place?

A. \$200.

Q. In that consignment was there a brown colt by Trugantic?

A. Yes sir.

Q. What was his condition at the time he reached New York and the time of the sale?

A. He was very tired, and fell down a number of times before we got to New York and we had to get him up and it affected him very badly.

59 Q. What was that condition due to?

A. To the long tedious trip.

Q. What in your opinion was the fair market value of that colt at that time and place had he been in good condition?

A. \$300.

Objected to by defendant, the bill of particulars shows he was valued at \$285.

Q. What did that colt sell for at that time and place?

A. \$160.

Q. Was there a brown filly by Trugantic in that same shipment?

A. Yes sir.

Q. What was her condition?

A. She was another one tired and sore, she got down and we had to get her up several times.

Q. What did you ascribe her condition to?

A. To the long ship, it tired her out.

Q. What was the age of this filly and the other?

A. They were yearlings past, coming yearlings in January.

Q. What was the value of this filly at that time and place if she had been in good condition?

A. The same as the other one \$200.

Objected to by defendant, the bill of particulars shows her market value to have been \$115.

Q. What did that filly sell for at that time and place?

A. She sold for \$100.

Q. Now was there an animal by the name of Red Star in that consignment?

A. Yes sir.

Q. What was his condition at that time and place?

A. Well, the shipment affected him, he was tied up and could not show his speed either.

60 Q. Did that have any effect on his market value at that time and place?

A. Yes sir, it did.

Q. What in your opinion was the fair market value of this horse at that time and place had he been free from that condition?

A. \$300.

Objected to by defendant, it is shown by the bill of particulars that he was of the market value of \$250.

Q. Well, we will amend the bill of particulars.

Mr. PATTON: We object to the amendment of the bill of particulars at this time; this statement was handed to us at my request, and on my statement to Mr. Salzenstein that if he would give me a statement I would not apply for a bill of particulars, in order that I might ascertain by inquiry what was the value of these animals in New York if necessary; now these various animals are stated to be in this paper of values that I have stated in the objections; now to come in this morning and tell us the statement I gave you six or eight months ago was not true, or the statement I gave you to work on in order to find out what were the values of these horses,

is very unfair, and it would seem to me that no amendment should be allowed at this time.

The COURT: My attention was not called to that one way or the other, of course if you are taken by surprise, the same rule of amendment applies to a bill of particulars as to any other pleading, of course if the adverse party is taken by surprise, a change of basis always furnishes a basis for appeal to the court for a continuance and all such.

Mr. PATTON: I don't want a continuance, I want to go ahead since we have got started.

The COURT: I don't think it is very material.

Q. What did this Red Star bring at that sale at that time and place.

A. \$220.

Q. Was there an animal in that shipment by the name of Bertha Craven?

61 A. Yes sir.

Q. What was her condition at the time she got to New York and that sale?

A. Very much tied up and sore from the long ship.

Q. What did you attribute that condition to?

A. To the long shipment.

Q. What in your opinion was the fair market value of that animal at that time and place had she been in proper condition?

A. \$300.

Mr. PATTON: I would like to know if you amend the bill of particulars in that regard the difference is \$290.

Mr. SALZENSTEIN: \$290 we have not changed.

Mr. PATTON: Then I object.

Q. What did she sell for at that time and place?

A. \$250.

Mr. PATTON: I think we may be able to save a little time by asking one or two questions with regard to this bill of particulars.

The COURT: You can cross examine as far as you wish to before we adjourn.

Mr. PATTON: I would like to get this information so I may act upon it if necessary; Mr. Kirby you were prior to the bringing of this suit in consultation with Mr. Salzenstein about these horses?

A. Yes sir.

Q. You had many conversations with him?

A. Yes sir.

Q. You remember the time do you that he was called upon by me to furnish me an itemized list of the values and selling prices of the horses?

A. I think I remember the time yes sir.

62 Q. You remember having a consultation with him in regard to that thing, to furnish me such a list?

A. I think he asked me the questions about it, yes.

Q. How did it come that the prices of these horses to which I have called the attention of the reporter as we went along are different and higher from the prices as stated to me in that statement, how does it come those horses in your judgment have grown greater in market value since the beginning of this suit?

A. You say why we did that?

A. Yes.

A. I don't know. I didn't know about those prices there.

Q. Wasn't that statement prepared by you and Mr. Salzenstein together?

A. I never saw that statement in my life.

Q. Didn't you talk to Mr. Salzenstein?

A. I talked to Mr. Salzenstein about the suit.

Q. About the market values of these various houses, didn't you give them to him as your judgment to make up these statement of items?

A. I showed him the catalog of what they sold for.

Q. Did you give him your opinion as to what the market value was in healthy, sound condition?

A. I don't remember of it.

Q. Do you know as plaintiff in the case from whom or where Mr. Salzenstein got the information to furnish to me the list of market values which was furnished to me?

A. No sir, he got part of it probably from me.

Q. Do you remember to have seen that itemized statement before?

A. No sir but I think he talked to me about this statement but I don't remember seeing it before.

63 Q. Did you give him the market values as they are set down as being the market values of those horses in healthy condition?

A. I don't remember that I did sir at all, I won't say that I did not, but I don't remember that I did.

Q. You do note from the changes in the bill of particulars the changes from the original typewriter and in ink that the market values in healthy condition, that a large number of those horses have been changed to a considerably higher value than originally, you notice that don't you?

A. I see they are, yes sir.

Mr. SALZENSTEIN: One question in this connection; do you remember how this statement of market value came to be made, whether it arose out of a joint conversation where you said that the difference would be a certain percentage without asking you particularly to each one of them?

A. Yes sir I remember that.

Mr. PATTON: What was the percentage that you gave of the difference?

A. Fifteen percent I think.

Q. Fifteen percent on all the horses?

A. Aside from Lou Blake and Rythmic Bell.

Q. And that would be fifteen percent higher than the prices that actually were brought?

A. Yes sir.

Q. And that is all you mean to say now, that the horses were damaged to the extent of fifteen percent in their sale except Lou Blake, that is what you mean to say now what you told Mr. Salzenstein then, and is that all you mean to say now that if they had arrived in a healthy sound condition they would have brought

64 fifteen percent more than they actually brought, with the exception of Lou Blake, is that what you mean to say now?

A. Mean to say?

Q. Do you mean to say that now?

A. I am satisfied they would have brought fifteen percent more yes sir.

Q. And that is what you told Mr. Salzenstein then?

A. I don't know whether I did or not, that was the least anyhow.

Q. But fifteen percent is the percentage that you say now; that is all.

— — —
Mr. SALZENSTEIN: Did you in the statement made to me state to me the market value of each specific horse?

A. I did not.

Q. What do you say as to your statement about it, when you were asked specifically as to the market value of each horse at that time and place, whether fifteen percent is the correct basis or your answers made in response to questions?

A. My answers in response to questions.

Mr. PATTON: Let me see, take Easter Bell, how much do you say now was her fair market value in that market had she arrived there in sound condition?

A. \$500.

Q. What did she actually bring?

A. I think \$285.

Q. Then do you mean to say when you told me fifteen percent that you were wrong about that there is considerable more difference between \$285 and \$500 than fifteen percent isn't there?

A. Fifteen percent, there was a damage of at least fifteen percent and more.

Q. You are now saying it is more are you?

A. Yes sir.

65 Mr. SALZENSTEIN:

Q. Mr. Kirby, will you explain to the jury what was done in and about moving this car in which those horses were at the places at which this through train stopped the length of time that you think it did?

A. Well sir, at a number of places between Lake and New York they iced up the meat cars that were on this train, and in icing up cars they move up a car length and stop at the chute and ice that

car, and move up a car length and ice another and so on through until the train is iced up, and they pull out in all probability—

Q. How many cars were there in the train that were being iced approximately?

A. O, it seemed to me twenty or thirty cars probably.

Q. What effect does that method of handling a train have on horses?

A. Very bad.

Q. In what way?

A. Jerking them off their feet, jamming backwards and forwards making them restless.

Q. What do you know about the running time of this other train called the horse special which leaves Lake and reaches New York?

A. I never was on that train I only know—

A. I simply ask you what you know about the running time, what time it was due to leave Lake and reach New York?

A. It was due to leave Lake sometime after three o'clock they told me it left Chicago at three o'clock and I would be picked up at Lake, and due in New York sometime Saturday night.

Q. When you speak of three o'clock you mean three o'clock on that Thursday the 25th of January in the afternoon.

66 A. Yes sir.

Q. Now these horses that you have named and told the sale prices of and their market value are the horses that were named in this bill of particulars or copy of account Mr. Patton referred to?

A. Yes sir, I looked it over and they are the same horses.

Q. I simply wanted to identify it.

The COURT: I suppose that is enough.

Witness on cross examination in answer to interrogatori-s propounded by William L. Patton, Esq., testified as follows to-wit:

Q. How long have you been in the horse business Mr. Kirby?

A. Well sir, I have been in the horse business all my life as far as that is concerned.

Q. How long have you been connected with the horse business in such way that it required the shipping of horses on railroads?

A. Well, since 1875 about.

Q. During that time approximately without trying to get you to say the exact number, about how many shipments of horses have you made on various railroads?

A. I could not get at that accurately.

Q. It would run up into the hundreds wouldn't it?

A. Yes sir, no, not into the hundreds, not with horses, but all the shipping I have done of course it would run up into the hundreds.

Q. I mean shipment of horses?

A. Yes sir.

Q. It would be over a hundred shipments?

A. Of horses?

Q. Yes?

A. No sir.

67 Q. In taking your horses, when driving horses around the circuit, taking them from point to point you would ship them by freight, would you not?

A. Yes sir.

Q. During this period of nearly thirty years you have been driving horses around the circuit?

A. Yes sir.

Q. Making short jumps from town to town where there were races?

A. Yes sir.

Q. At each jump you would have to make a shipment?

A. Yes sir.

Q. Would not you say you made a hundred or more shipments?

A. I understood you to — sales, O yes, I will say over a hundred.

Q. Considerably over a hundred.

A. Yes sir.

Q. How many shipments to New York State have you made?

A. Well, I won't say positively, from five to seven loads I have shipped there.

Q. How many shipments since 1889?

A. I could not remember dates well enough to tell you right now.

Q. Well, 1899 is nineteen years ago, how many shipments in nineteen years?

A. Well, as I say from five to seven shipments.

Q. In that period?

A. Yes sir.

Q. Have all those shipments been of what you call high class horses?

A. Yes sir.

Q. Over what railroads have you made those shipments?

A. I have made them over the Wabash and over the C. & A.

Q. One over the C. & A. and the balance over the Wabash?

A. Yes sir.

68 Q. Now in making these shipments it was necessary I presume or convenient or proper for you to ascertain what the rate was going to be on each shipment?

A. Yes sir.

Q. And on each shipment you would have some conversation with the agent, and then when the time came for shipping you would be handed a contract to sign?

A. Yes sir.

Q. That occurred on each shipment that you made?

A. Yes sir.

Q. And the mode adopted at the time of this shipment that is in controversy now was the same as the mode adopted on the former shipments?

A. Yes sir.

Q. And on the former shipments when you signed this contract a copy would be taken by you and a copy by the railroad company?

A. I suppose so, yes I had one.

Q. You had in your possession during this period of time from five to seven of these contracts of shipments?

A. Yes sir.

Q. These contracts have been made on a printed blank, what is called the Uniform Live Stock Blank is it not?

A. I judge so, yes, it looked to me so.

Q. And on each of those contracts was a notice in large letters to the shipper to read this contract?

A. I never read one in that way in my life.

Q. No, but that notice was there to the shipper to read the contract was it not?

A. I don't know sir, may I state——

Objection by plaintiff as not cross-examination.

69 The COURT: It don't make very much difference what the order is for the written contract, it might be presented to him and identified and later on be offered, of course, prima facie as soon as identified it would be received, probably it would be the best way to preserve all this until they introduce this witness in rebuttal.

Mr. PATTON: They have already gone into that matter by asking him if he knew what was in this contract, and he answered he didn't know.

The COURT: Then it would be just as well, if he stated in chief he did sign such a contract.

Mr. SALZENSTEIN: He said he signed the contract showed him by the agent, and the agent told him to sign here and sign here, what was in it he didn't know.

The COURT: And he said he did sign such statement, I think it is just as well to let him be cross-examined now.

Mr. GRAHAM: As I understood Mr. Salzenstein his objection went rather to other contracts he signed in shipping over other roads at other times.

The COURT: That objection would not be well taken, the extent to which a shipper is familiar with the method of transacting business in all cases I have tried the fact is always allowed to go along tending to show whether he exercise such diligence as a man should under the circumstances, as tending to test his truthfulness, usually examine as to habits, custom and all such things.

Q. Let me have that paper Mr. Kirby?

A. Which paper?

Q. The paper you signed at the C. & A. Railroad office of the company for the stock before it was shipped. (Witness hands over a paper.) I show you this paper being marked at the top "Form 85.10M 5-05" which I ask the reporter to mark Ex. "A"

70 and show you the signature "N. T. Kirby" at the bottom of that paper, is that your signature?

A. Yes sir.

Q. Signed by you?

A. Yes sir.

Q. I show you a signature on the back of that paper under the word in heavy letters "Release" N. T. Kirby, is that your signature?

A. That is my signature, yes sir.

Q. Both signatures are your signatures signed by you at the depot of the Chicago & Alton Railroad Company freight depot, before you started on your journey?

A. That is right sir.

Q. Now that contract is to all appearances the same form of contract as the contract that you signed on the various occasions you shipped over the Wabash road is it not?

A. Perhaps it is, I never read one over, I never looked one over in my life, I just signed them, and I know I signed them in two places if I have a pass.

Q. And you have noticed on the other contracts and this contract printed across them in red letters, "Read this contract"?

A. I don't know whether I have or not I could not if I never read one of them over in my life.

Q. You will not say you did not notice on this contract printed in large red letters across the face of this contract, "Read this contract"?

A. Yes, for I didn't see the contract open. It was just pushed through the grate and he said sign here, and turned it over and said sign here.

Q. You knew when signing this contract by experience on former occasions that you were signing a contract for the shipment of this stock didn't you?

71 A. Yes, the same as other shipments.

Q. You have had experience five or six times shipping to New York on contracts which to all intents and purposes as far as you are able to recognize were similar contracts to this and you signed it as a contract?

A. Yes sir.

Q. Now with reference to these conversations with Mr. Stuttsman, Mr. Stuttsman is what is called Live Stock Agent is he not?

A. He is represented to me to be that, yes sir.

Q. And he got into communication with you as far as you know through Mr. Connor the passenger agent?

A. Yes sir.

Q. Where did you say you first saw him, did he come around to your shop?

A. Mr. Stuttsman?

Q. Yes.

A. Yes sir.

Q. And how long was that before the date of this shipment?

A. Probably ten days before.

Q. In that conversation you told him you wanted to deal with him and not with Mr. Eggleston I believe?

A. Yes sir.

Q. You knew that Mr. Eggleston was the freight agent in charge of the freight business here in Springfield?

A. I knew he was the agent here, yes sir.

Q. The reason you didn't want to deal with him was you had been unable to get accom-odations from him?

A. Yes sir.

Q. You told Mr. Stuttzman what? Just tell us what you told him on that occasion, the first occasion.

72 A. He introduced himself as the Stock Agent, he said Mr. Connors had spoken to him about it, and I stated to him why I would ship with him and so on, because I wanted to get on the horse special, that I had a high bred, high priced lot of horses.

Q. Did you tell him anything on that occasion how you had learned about the existence of the horse special, how you had learned?

A. In a way, yes.

Q. Well, in what way?

A. By a party that shipped over the road.

Q. Mr. Thomas that was, was it not?

A. Yes sir.

Q. You told him that Mr. Thomas had informed you about this fast horse special?

A. Yes sir.

Q. And on that occasion he told you he did not know anything about that, that he would have to make some inquiries didn't he?

A. He said to me I will ship you to Chicago and put you on the Michigan Central at Chicago, I says I don't want to go to Chicago, I don't want to be bumped around switching at Chicago.

Q. That is the Chicago Stock Yards?

A. Yes sir.

Q. You understood that this fast horse special that Mr. Thomas had spoken to you about started from the Stock Yards?

A. I don't know where it started from.

Q. You understood in order to get on that by way of Chicago that your shipment would have to go through the Stock Yards?

A. Well I didn't know where it would go to get on the Michigan Central, I didn't know what arrangements they had, I wanted to connect there and wanted to avoid going into Chicago and being bumped around there.

73 Q. The prime object of your endeavors was to get your horses put on the through freight train?

A. Onto this fast horse train.

Q. On the fast train is what you wanted?

A. Onto the fast horse train, because I understand it didn't carry anything but horses and was a fast horse train.

Q. And you were objecting strenuously to having your horses put on any train in the nature of a local freight train, or any train making frequent stops and frequent switching on account of the effect on the horses?

A. Yes sir.

Q. What was the main object in making that arrangement?

A. The main object to get to destination as soon as possible.

Q. And to avoid the intermediate switching and bumping around

and stopping of trains and waiting at stations and all that sort of thing?

A. Yes sir.

Q. On account of the detriment to your horses by reason of their high breeding and nervous disposition?

A. Yes sir.

Q. Now Mr. Stuttzman on that occasion informed you that he would have to make some inquiries didn't he about that connection?

A. I don't just remember whether he stated there just the route he would take me, but he says I will ship you to Joliet.

Q. Who was the first one that mentioned anything about Joliet?

A. Myself.

Q. You objected strenuously going by way of Chicago and said, you would not go by way of Chicago?

A. I didn't say I would not but that is the route I wanted to go by Joliet and the cut off.

Q. You informed him that is the way you wanted these horses routed was by way of Joliet?

74 A. Yes sir.

Q. You told him that you knew that was the way to go because Thomas who was a large shipper informed you that is the way he shipped his horses?

A. Yes sir.

Q. And you in that entire conversation were referring Stuttzman to the information you had secured from Mr. Thomas?

A. Yes sir.

Q. And were directing him to procure this shipment by way of Joliet?

A. I would go by the way of Joliet if I went to Chicago that is the route I wanted to take.

Q. But you did not want to go to Chicago?

A. No sir.

Q. That is what you were saying to him, that your information from Mr. Thomas led you to believe that the best way to go was by Joliet, and then make connection at Joliet and Lake to catch the fast horse train at Lake?

A. Mr. Thomas didn't say anything about Lake.

Q. Well, the cut-off as you call it?

A. The cut-off, yes sir, that is right.

Q. And it was by your direction that the Chicago part of it was cut out?

A. Yes sir.

Q. You would not stand for that?

A. I didn't want to ship by Chicago.

Q. Now at that conversation there was no definite arrangement made was there?

A. No sir.

Q. No rates quoted?

A. No sir.

Q. Just a preliminary conversation?

A. Yes sir.

75 Q. In which Mr. Stuttsman said he would make inquiries or something of that kind?

A. Yes sir.

Q. There was a later conversation when Mr. Stuttsman told you he had been to Lincoln to see a Mr. Donald or McDonald was there not?

A. I never heard of any trip to Lincoln from him I don't know anything about it.

Q. Didn't Stuttsman tell you that he had been inquiring of a gentleman who had made frequent shipments to New York by the fast horse train, and that he had learned some of the details of that matter from him in a subsequent conversation?

A. No sir.

Q. You did have a subsequent conversation however with Stuttsman?

A. Yes sir.

Q. You still insisted in that conversation you should go by way of Joliet and the cutoff?

A. No sir, I will state the conversation if you wish.

Q. Isn't it true in every conversation you still insisted you would not let the horses go by way of Chicago?

A. In the first conversation, all through the first conversation, after the first conversation nothing was said about going to Chicago.

Q. It was definitely settled in the first conversation you should not go by way of Chicago?

A. I didn't say I would not do it but I didn't want to go by way of Chicago.

Q. And the result of that conversation was that your shipping directions were for the going by way of Joliet and the cut-off?

A. Yes sir.

76 Q. Your purpose in that was to prevent the horses being jammed around on local freight trains and trains that stopped frequently at various points along the lines?

A. Going to Chicago?

A. No; on the whole journey?

A. O, yes, I wanted to get the fast train that would take me through, he said nearly on passenger time.

Q. And the information on which you acted in requiring this particular route was the information you had acquired from Mr. Thomas?

A. About shipping by way of the cut off, was, and the shortness of the time going to New York.

Q. When was it that you first learned of the proposed amount of money that was to be paid for the shipment to New York?

A. You mean the first rates I got of any road?

Q. O no, from this road?

A. Now then in the first conversation that I had with Mr. Stuttsman he took me over to the office and said to Mr. Eggleson fix this man out, and order him a car, I said no, don't order a car give me a rate first, I had the rates of the other roads.

Q. What was the rate on the other roads?

A. \$170.60.

Q. How many roads had you inquired of with regard to that rate?

A. I inquired of the Wabash first, in particular, and of the Illinois Central later on, a few days later.

Q. And was the rate given you by the Illinois Central and the Wabash conditioned on catching any particular train or anything of the kind or any particular movement?

A. Nothing only they would put me on the Michigan Central at a different point on the main line, at some other different point, and the rates were all the same.

Q. Were those other rates with reference to the fast horse train, the Michigan Central fast horse train?

A. Shipment to New York.

77 Q. No, no, you understand I think, were the rates given you by the Wabash and the Illinois Central conditioned on the shipment being taken on this Michigan Central fast horse special?

A. I never asked them anything about that, it was shipment to New York.

Q. You never suggested anything about that to them?

A. About the fast horse train?

Q. Yes?

A. No sir, not with the Wabash.

Q. Or the Illinois Central?

Objected to by plaintiff as not cross-examination.

Mr. PATTON: He stated in his original examination he had inquired of these various roads and got the same rates he got on the Alton.

Mr. SALZENSTEIN: I don't remember that, but if he did it is immaterial, the question is what was the contract with these people, and what did they agree to do.

The COURT: The ultimate question to prove is what was the contract with this defendant, and in testifying in chief he states he had seen these other two roads, had gotten a rate from them, and he told this man what rate these other people had given him.

Mr. PATTON: What he said was, I said to Mr. Stuttsman I have a rate from the other two roads, the Wabash and the Illinois Central, you get me a rate, and he said all right and I went out of the house, that is what he said on direct examination that opens up the entire field.

Mr. SALZENSTEIN: I don't see how it would be cross-examination to find out what the other rates were and what the details were.

The COURT: If it could be assumed that the defendant would not deny what he testified to with reference to that it would be wholly immaterial, but in order that the jury may have the whole thing and find out what the truth is I think it is safer to let the

78 whole thing go in.

Mr. SALZENSTEIN: What Mr. Patton is now asking about are the details, whether he was to connect with the Michigan Central

and the fast horse train or not. I suppose the purpose from Mr. Patton's opening statement he desires to inject into this case something relating to the interstate rate, that here is a contract outside of that, if it was to amount to anything it would be a matter of defense, the defendant could not raise it on cross examination in any way shape or form that I could see.

The COURT: I am inclined to think the wiser course is to let him answer the question.

Q. What was said if anything was said between you and the Illinois Central people in inquiring about this New York rate, about the fast horse special, was anything said between you and the Illinois Central people?

A. No sir.

Q. The only people you mentioned the fast horse special to were the Chicago & Alton people?

A. Yes sir, that is right.

Q. The rate quoted by the Chicago & Alton people to you was the same rate as that quoted by the Illinois Central and the Wabash which was \$170.60?

A. Yes sir.

Q. And according to your ideas, your notion, the Chicago and Alton quotation included an agreement that the horses should be so shipped as that they would catch the fast horse special and go to New York on the fast horse special?

A. That is the reason I shipped that way.

Q. And your understanding was that the rate of \$170.60 included that agreement?

79 A. That was the rate of all the roads, was three all alike.

Q. Your understanding was that the rate of \$170.60 included that agreement?

A. Well, I don't know as I just understand that question.

Q. I will put it in another way, you say the reason you shipped on the Alton was that you were to have this, what you call a guarantee to catch the fast horse special out of Chicago on January 25th?

A. Yes sir.

Q. Now when you made what you say was your contract it was with Stuttsman?

A. Yes sir.

Q. That contract was conditioned and dependent upon the catching of the fast horse special out of Chicago on January 25th?

A. Yes sir, that is what I took it.

Q. And the rate quoted to you for that agreement as you say was the same rate quoted to you by the Illinois Central and the Wabash?

A. Yes sir.

Q. How long prior to the time of this shipment had you talked with Mr. Thomas in regard to the routing of horses through Joliet and the cut off and also on the fast horse special?

A. At the Fasig-Tipton sale the year before.

Q. You then learned that he had shipped his horses that way?

A. Yes sir.

Q. And you wanted to duplicate what he did?

A. Yes sir.

Q. And so you had instructed Mr. Stuttsman, informed him?

A. I told him I wanted to ship that way.

Q. And the reason you told him you wanted to ship that way, that Thomas had told you that was the best way to ship?

A. Yes sir.

80 Q. You told him Thomas was a big horse shipper and knew about those things?

A. Yes sir.

Q. And you relied on the information you got from Mr. Thomas in that regard?

A. I wanted to get on the horse special.

Q. And you relied on the information you got from Mr. Thomas in that regard?

A. On the information I got from him and Mr. Stuttsman.

Q. Well, at the time you had this first conversation with Mr. Stuttsman, Mr. Stuttsman had not said anything about the fast horse special had he?

A. I don't understand, the question again?

Q. I say in the first conversation you had with Mr. Stuttsman nothing was said by him about any Joliet connection?

A. No, but in the same conversation there was by me.

Q. And it was in that same conversation you gave him this information about Mr. Thomas?

A. Yes sir.

Q. And in that conversation you were relying on the information that you got from Mr. Thomas?

A. Yes, I learned that was a quick route.

Q. From Mr. Thomas.

A. Yes sir.

Q. Now Mr. Kirby, from what I know of you you are a man who keeps abreast of the newspaper information of a certain kind?

A. To a certain extent.

Q. You know that since 1889 or thereabouts that it has been the law that a railroad shall have on file in its office the tariffs for the inspection of all shippers who want to look at them you know that?

81 A. No sir, I never read one.

Q. Not what you have read, but you know that was the thing that a railroad had to do, that it had to have the tariff and rates on file in its office for the inspection of people who proposed to ship over the railroad?

A. Well, I didn't know that they had to be there, but they might have been, I don't know anything about it, I didn't know that they had to be there or that they were there.

Q. You have seen from time to time in various railroad depots to which you had to go in these shipments, noticed the schedules and tariffs were on file haven't you?

A. I have of passenger trains, such as that.

Q. And freight trains at freight depots?

A. I never read it, never read either one, I noticed some railroad notice or something of that sort, and just passed it up as I would anything else almost on the wall.

Q. Passed it up, but I say you have noticed from time to time in the freight depots the notice of the company that the tariffs were on file for the shippers' inspection if they saw fit to use them?

A. I don't know but I have and I don't know whether I have or not.

Q. Now you say you didn't know anything about what was in this contract that you signed?

A. I never saw that until you handed it to me yesterday or the day before.

Q. Never saw it?

A. No sir.

Q. Where has it been all that time?

A. I don't know.

Q. Where was this contract at the time you signed it?

82 A. Excuse me, I thought you meant the other statement about price.

Q. I mean this contract you signed at the depot?

A. Oh, yes.

Q. After you signed it where did it go, who took it?

A. I did.

Q. What did you do with it?

A. I put it in my pocket.

Q. You say you didn't read it?

A. No sir, and I never read one of them in my life either.

Q. What did you suppose you were asked to sign that contract for?

A. Simply as a receipt that they had received the horses and would take them to destination according to agreement.

Q. What did you conceive was the necessity of your signing a receipt to the railroad company when it was the railroad company receiving the horses?

A. Because I was compelled to or they would not take the horses.

Q. You knew you were compelled to sign the contract or they would not take them at the rate made to you?

A. I didn't say anything about the rate, but they would not take them unless I signed the contract.

Q. But is it a matter of fact you knew you could not get a low rate on horses without signing a contract?

A. I could not get any rate, I could get a rate but I could not get them shipped out without signing a contract.

Q. Didn't you know that you could not get them shipped at a reduced rate of freight without signing a contract?

A. I never asked for a reduced rate.

Q. Isn't that what you were doing when you traveled around amongst the railroads to get the lowest rate?

A. I got a rate, I always get that before I start.

Q. The reason you go to various railroads is to see where you can get the lowest rate, is that it?

83 A. No sir, that ain't it.

Q. What did you go to the different railroads for?

A. What did I go to the Chicago & Alton for?

Q. No, why did you inquire around among the different railroads for if not for learning the lowest rate?

A. I don't know how the rates change from the year before or two years before, and I just wanted to know the rates.

Q. Why did you go to three different railroads in order to ascertain that thing?

A. The first was to see how I would ship the horses and I simply asked the rate.

Q. As a matter of fact you were wanting to ship your horses in the most economical way weren't you?

A. I didn't want to pay two prices.

Q. In other words you were bargain hunting, hunting for the place you could get the service done that you wanted at the lowest rates?

A. Just simply a matter of business.

Q. (Question read to witness.) Isn't that so?

A. I don't understand it in that way, that I was bargain hunting.

Q. Would you understand it in the way put in the latter part of the question, you were going around trying to find where you could get the lowest rates on these horses?

A. I simply ascertained the rates.

Q. Why?

A. To see how it compared with the years before, I always ask that.

Q. Why were you ascertaining the rates from three railroads if you were not ascertaining it for the purpose of finding out how the rates of the various roads compared with each other, isn't that true?

84 A. Because each road was soliciting the horses, the road that give me advantages, and I asked the rates and so on.

Q. The roads didn't know anything about the horses until you told somebody connected with them you had horses to ship did they?

A. That is right, I commenced in time, probably a week or ten days ahead.

Q. There were three roads competing for the shipment?

A. Asking for the shipment, yes sir.

Q. And you were inquiring rates from the three different roads?

A. Just simply asked the rates because I was in the habit.

A. Of inquiring rates?

A. Yes sir.

Q. And your object in so doing was to secure the lowest rate and best accommodation was it not?

A. No sir, I would ship over the road that gave me the best service.

Q. Irrespective of the rate?

A. Yes sir.

Q. You know Mr. Kirby, don't you, that rates on merchandise, stock, things of that kind, are proportioned to the value of the ship?

A. I suppose so.

Q. You cannot ship fast, high bred, nervous disposition, high bred racing and pacing stock for the same amount you can ship a carload of mountain ponies?

A. Carload rates, all freight.

Q. The higher the price of the horses the higher the rate, you know that don't you?

A. I know it is just a certain rate on a freight train from here to New York by the different roads as they stated to me.

85 Q. On horses of that class?

A. I have never paid any different.

Q. Did you ever ship any cheap horses?

A. No sir, but I had some not as good as others in the car.

Q. But what I am asking is don't you know as a matter of fact that the rate on horses or on merchandise of any kind grows higher as the value of the shipment grows higher.

Mr. SALZENSTEIN: The carload rate?

Mr. PATTON: Yes.

Mr. SALZENSTEIN: Put it in the question.

Mr. PATTON: You may ask him if you want to, I will put it my way.

(Question read to witness as asked.)

Objected to by plaintiff unless it is put in carload rates, the witness ought to understand what is in the mind of the examiner, the question should have some relevancy to the issue before the jury.

The COURT: You can bear that in mind, and if he don't put it in carload rates you will have a chance. The objection is overruled.

Q. (Question read to witness.)

A. On horses it does not where you ship by carload rates.

Q. How do you know?

A. I know from getting the rates from different roads.

Q. You never shipped anything but higher priced horses?

A. Not to this sale but other sales I have.

Q. Now you arrived in Joliet about six o'clock.

A. Yes, I looked at my watch and it was just six o'clock.

Q. What part of Joliet was that, was that in the Chicago and Alton yards or in the Central yards or do you know?

A. No sir I don't know, I know it was about the center of Joliet and within probably three blocks of the Michigan Central depot, I don't know what switch we was on.

86 Q. At that point where you arrived at six o'clock was your car cut off the train which brought it from Springfield?

A. It was.

Q. And was left on the siding there?

A. Yes sir.

Q. And that was the same siding from which the car was subsequently taken by the Michigan Central train?

A. It was picked up by an engine from the Michigan Central

and placed over to their stock yards probably five or six blocks further later on.

Q. How much later on?

A. About noon that day, just about noon the 25th.

Q. What time did you leave Springfield?

A. About eight o'clock that night.

Q. At night?

A. Yes sir.

Q. You got into Joliet at six o'clock the next morning?

A. Yes sir.

Q. That is your car got to the point where it was subsequently picked up by the Michigan Central Freight engine at about six o'clock?

A. Yes sir.

Q. And that is the point that your troubles began?

A. Yes sir, I suppose so.

Q. How about the value of these horses they were fancy horses?

A. Yes sir.

Q. Had fancy values?

A. Yes sir.

Q. And the values you have put on them are based on the fact that they were fancy horses?

A. Yes sir.

87 Q. And appeal to you because you are a lover and driver and owner of fancy horses?

A. Yes sir.

Mr. SALZENSTEIN: What do you understand by the term fancy horses as used just now?

A. They are pedigreed horses and record horses.

Q. Pedigreed horses and record horses?

A. Yes sir.

Q. Have those a well established value at certain places at certain times?

A. They have.

Q. In speaking about the rates of the different railroads I will ask you when it was that you obtained a rate from the Illinois Central and what the occasion of it was?

A. To get onto the horse special, the fast horse train on the Michigan Central.

Q. Was that before or after this law suit?

A. O, before.

Q. Now you said something about not wanting to contract with Mr. Eggleston, Mr. Patton's question was because you could not get accommodation, was that the case or what was it, tell the jury what was the reason why you didn't want to deal with Mr. Eggleston?

A. Mr. Eggleston always seemed to be too busy to attend to my wants, I had nothing against him at all, he just simply seemed to be too busy to attend to my wants and forgetful about it, and so I said that if we left it to Mr. Eggleston that he would not give me satisfaction, because he would forget it or negligent about it either too

much business or didn't care about my business, something of that sort, nothing against him.

Q. This paper that you signed, "Exhibit A" just tell the jury how it was held to you when you were asked to sign it?

A. I don't just remember, I remember this much that there is a grating, a place to slip the papers and things through and the gentlemen says sign here and sign there.

88 Q. Was the paper folded or how was it at the time, in what shape was it?

A. The paper was folded up when it came to me that day, and he says sign there, then he opened the paper and turned it over and I signed here for the pass on the other side, and he just gave me one and he took the other.

(Here follows way-bill marked page 89.)



ACCOUNTANTS ASSOCIATION STANDARD FORM NO. 101. (REVISED 1922)

THE CHICAGO & ALTON RAILWAY-BILL FOR

WAY-BILL FOR

ROUTE.

1 VIA

2 VIA

JUNCTION WITH

JUNCTION WITH

BY

WEIGHED AT

GROSS LBS.

TARE LBS.

NET LBS.

WHEN A THROUGH RATE IS USED AND A SHIPMENT IS TO BE REBILLED BY ROUTE, THE SUBDIVISIONS MUST BE SHOWN IN THE RATE COLUMN IN ROAD ORDER, NOTING OPPOSITE EACH PROPORTION THE INITIAL OF THE ROAD TO WHICH IT APPLIES.

LENGTH OF

MARKED

FOR ADDITIONAL CHARGES, SEE

W-B No.

SHIPPER'S
CONNECTING LINE REFERENCE, ORIGIN
CAR AND WAYBILL NUMBER AND
PORT OF SHIPMENT

MARKS, CONSIGNEE AND DESTINATION

N. D. Kirby

*Casig. D. P. St. Louis & Co.
New York City
N. Y. C.*

Loaded 4 C

Pass

In care fast

AGENTS AT JUNCTION STATION, RECEIVING THIS WAY-BILL FROM CONNECTING LINE

1

2

3

4

Q. What conversation took place between you and the gentleman at that time about the shipment of these horses?

90 A. I came in and asked him for my contract and he handed this to me. I says to him have they made arrangements at Joliet about getting me onto the Michigan Central, and he held up a way bill and says you see it is written across this way bill, those instructions, I says that gets there when I do have they made arrangements, he says they have attended to that, Mr. Stuttsman wasn't there.

Q. I would like to have that way bill.

Mr. PATTON: I have not the original, but have a copy of it.

Q. I wish you would look at that paper and see whether the general appearance of that paper is the same as the one he showed you as being the way bill?

A. It certainly, of course I seen the paper, the prior way bill is a different shaped paper as far as that is concerned, but there was the same writing across the bottom of the other but I didn't read what the writing was for he didn't let me have hold of it, he held it and flashed it this way.

Q. How much of it did you see, what did you see on it?

A. I just saw there was a line or two on the bottom that is all, he says you see the instructions are on here, I says that gets there at the same time we do, I wanted to know if he had made arrangements ahead, he says I am night man, I have nothing to do with that, they attend to that.

Q. With that understanding with Mr. Patton that he will have this identified, this is a copy of that paper, exhibit "B"?

Mr. PATTON: You say Mr. Kirby your recollection is when you signed this this paper was folded up?

A. I don't know just how it was folded up but he just shoved it through for me to sign there.

Q. Don't you know that this contract was signed in duplicate with a piece of manifold between this and the other and not folded up but flat out when handed to you to sign and there was one
91 given to you and one that the man kept there at the window wasn't there?

A. These were all made out before I got there, before I got to the office, and this was folded up, and he opened it and handed it to me, and said sign there and sign here, it was a long piece of paper we had, I don't know that it was open enough so that I could see anything there.

Q. Did you sign two pieces of paper?

A. I signed just that one.

Q. I hand you another piece of paper and show you the signatures, you say the one marked Exhibit "A" that is one?

A. Yes sir.

Q. That is the one you saw before is it not?

A. Well, they look so near alike I don't know which I saw before as far as that is concerned.

Q. You have identified the signature on Exhibit "A"?

A. Yes sir.

Q. Now the signature on this one I hand you and which I ask to be marked Exhibit "C" was apparently written at the same time and by the same pencil and under the same circumstances was it not?

A. That is my signature.

Q. Well, you know about the use of manifold paper Mr. Kirby?

A. Yes sir.

Q. Don't these papers to your mind show that one is a manifold copy of the other, and they were both signed at the same time through a piece of manifold paper?

A. It looks so here, yes sir.

Q. And the one marked "Exhibit C" appears to be the original does it not and the one marked "Exhibit A" appears to be the one that was signed through the manifold paper, one is marked in red printing "Original" that is Exhibit "C" is it not?

A. Yes sir.

Q. And the one that you produced having been marked Exhibit "A" has in red ink printed across the face of it "Duplicate" has it not?

A. It looks so.

Q. Well, isn't it true, beyond the question of looking so?

A. That is true; well, this looks like the original to me.

Q. I ask you about the mark on the paper?

A. Oh, the mark on the paper, yes.

Q. As a matter of fact you did not use the pencil on paper to sign your name to the contract there on that occasion but once?

A. Yes and I signed it in two places.

Q. If your signature does appear in such way you cannot and do not dispute it is your signature, and the paper must have been executed in duplicate by a manifold sheet?

A. Yes sir.

Q. And you are contending that at the time this paper was handed to you it was folded up?

A. Yes sir, as I saw it, he just pushed it through and kept his hand on it and said sign here and here.

Q. We offer both Exhibit- "A" and "C" as being the contract under which this shipment was made.

The COURT: At this time you cannot offer it as substantive evidence, you can have it identified on cross examination and hold it up until your time comes.

Mr. PATTON: Then I will not offer it. I desire that to be identified as being the original and duplicate of the same paper executed at the same time.

Mr. SALZENSTEIN: That we don't concede one is marked original and one duplicate that don't show.

93 The COURT: He has made such identification as he is able to make by this witness any way and when his time comes to offer it we will see it is proper to identify papers by the man making them on cross examination, and withhold them until the time comes for offering his evidence.

Mr. PATTON: How many conversations did you have with Mr. Stuttsman about this thing; first you had one conversation at your shop, that was about ten days before the shipment?

A. Yes sir.

Q. Then when was the next conversation and where?

A. Probably four or five days before I shipped.

Q. Was that at your shop?

A. Yes sir.

Q. When was the first time that you went with Mr. Stuttsman to the freight depot?

A. The first time that I ever met him when he come to get the load.

Q. That was on the occasion of the first conversation?

A. The first conversation.

Q. You went from your shop to the depot?

A. Yes sir.

Q. Was it then you had a conversation between Mr. Stuttsman, Mr. Eggleston and you in which the rate was given?

A. No sir, I asked for the rate at that time, asked them to give me a rate.

Q. A Rate was not quoted then?

A. No sir, they didn't know the rate.

Q. And when was it you went again to the freight depot and secured knowledge about the rate?

A. I didn't go Mr. Eggleston called me up.

A. On the telephone?

A. Yes, I called him up the next day and asked him if he had got that rate, he said he had entirely forgotten it and I said
94 don't forget it for I mean business, and the next day he called me up and he says I have got that rate, all right, let us have it, \$170.60.

Q. Well, were you with Mr. Stuttsman on any occasion at the freight depot except the first occasion when you were over there that you have told about?

A. I think never.

Q. The second time then that you went to the freight depot was when you went on the night of the shipment and got this, signed this contract.

A. No sir, I was there afterwards to see if the car had arrived.

Q. On what day was that? The same day of the shipment?

A. O, no, it was probably Friday or Saturday before I shipped Wednesday, Saturday probably.

Q. With whom did you have a conversation on that occasion?

A. I didn't see Mr. Eggleston there, so I went out and talked to the yard master.

Q. That was simply with regard to getting the car?

A. Getting the car to the fair ground.

Q. You wanted the car to go to the fair ground because the horses were at the fair ground is that it?

A. Yes, sir.

Q. And then as I gather, you were at the freight depot three

times, first on the occasion that you went with Mr. Stuttzman second, when you went down and had the talk with the yard master about the car, third, when you went there the night of the 24th of January when this contract was signed?

A. Yes sir, and I was there one other time and if my memory serves me I saw Mr. Eggleston on that time and asked him to put the water in the car.

Q. Was that after the conversation with the yard master?

A. Somewheres about the same time, no, just before that.

95 Q. Before you had the conversation with the yard master?

A. Yes sir.

Q. Was there any conversation at that time other than about the water in the car?

A. And getting the car to the fair ground.

Q. You went there in order to tell him where you wanted the car put?

A. Yes sir.

Q. And that is all that took place at that time?

A. Yes sir.

Q. Then four times you were at the depot, first with Stuttzman?

A. Yes sir.

Q. When you had a conversation about what you wanted?

A. Yes sir.

Q. In which you gave directions to ship by Joliet?

A. Yes sir.

Q. And in which you told them you would not order any car until the rate was made?

A. That is right.

Q. Then on some days later after Mr. Eggleston had telephoned you about the rate and you told them where you wanted the car put and you wanted it ordered?

A. This conversation about where the car would be put was when I made arrangements, or was making arrangements, the understanding was to load at the Fair ground, the roads will take loads from the fair ground or put it back, but not a piece of a load in the same contract.

Q. That was in the first conversation?

A. Yes sir, in the first conversation, about shipping to New York yes sir.

Q. And the second time you went over was after you had talked with Mr. Eggleston over the telephone, and in that conversation it was about putting water in the car?

96 A. Understand this talk about putting the car out etc. was at my shop with Mr. Stuttzman.

Q. Not in the presence of Mr. Eggleston?

A. No sir.

Q. At the second conversation related merely, the second conversation at the depot related merely to putting the car out at the fair ground and having water in the car?

A. As I remember it that was the first conversation when Mr. Stuttzman came into my shop, and took me then over to Mr. Eggleston, that I would consider the first time I had a conversation.

Q. You have named four times when you were at the freight depot, identify those times, there was the first time when you went with Mr. Stuttsman, that is right is it, to the freight depot the first time you went to the freight depot about this matter was the time you went with Mr. Stuttsman, about ten days before the shipment?

A. Yes sir.

Q. Then you had a conversation with Mr. Eggleston about the rate?

A. Yes sir.

Q. You then went over to the depot about having water put in the car?

A. After the car arrived, yes sir.

Q. You then went over to see the yard master or to see Mr. Eggleston and did see the yard master?

A. It might have been the same time, all in the same time, I went out there to examine the car, etc.

Q. You are not definite whether you were at the depot three or four times?

A. I said I was there four times or more in looking after the car, getting feed in and such as that.

Q. Were you in the depot on these various occasions?

A. I stepped into the depot yes.

Q. Went into that office where Mr. Eggleston had an office at the south end of the corridor?

A. I did not, If I wanted Mr. Eggleston I went to the window and called for him.

Q. I say you were in the part of the depot where there is a long corridor?

A. Yes sir.

Q. And at the south end a closed door behind which Mr. Eggleston sits?

A. I was in there just once, that was in the first conversation when Mr. Stuttsman asked him to fix Kirby up with a car etc.

Q. That was in Mr. Eggleston's office?

A. Yes sir.

Q. On the other three or more occasions you were at the depot you were in the depot in the corridor in front of the grated window?

A. Yes sir.

Q. And not in Mr. Eggleston's office?

A. I think not.

Q. Now as I understand you Mr. Kirby, your testimony in regard to this contract is that for \$170.60 the Chicago & Alton Railroad Company through Mr. Stuttsman agreed to ship your horses from Springfield to the City of New York and agreed positively that that carload of horses should go by way of Joliet, and should be attached to the fast horse special which left Chicago about three o'clock in the afternoon of January 25th?

A. That is the fact.

Q. That is what you say the contract was?

A. Yes sir.

Q. That you were to have a guarantee that that carload of horses

should go by way of Joliet and should be attached to the fast horse special leaving Chicago in the afternoon of January 25th.

A. Yes sir.

98 Mr. PATTON: Now for the purpose your honor, of the record, I desire to move to exclude all of the testimony of this witness with reference to the terms of the special contract set out and alleged in the declaration, and testified to by him, first, on the ground that Mr. Stuttzman as Live Stock Agent of the Chicago & Alton Railroad Company, had no power or authority under the rules of the company and under the law and rules of the Interstate Commerce Commission to make any such special contract; and second, on the ground that any such special contract, if made, would be wholly illegal and void under the law and under the rules of the Interstate Commerce Commission and the classification and tariffs which are stipulated to have been duly filed and published in the office of the Chicago & Alton freight depot at Springfield, Illinois.

Motion overruled by the court. To which ruling of the court the defendant by its counsel then and there excepted.

Mr. PATTON: I desire further to move to exclude the testimony as to the special contract, on the ground that the evidence shows the signing of a written contract after the date and time of the alleged making of the special contract, which under the law would become the contract between the parties.

Motion overruled by the court. To which ruling of the court the defendant by its counsel then and there excepted.

Mr. PATTON: And as further grounds for such motion I desire to allege that the testimony of this witness that he did not know what was or were the terms of that contract or of the matters and things contained in it does not prove or tend to prove that he had no such knowledge, but that on the contrary under the law and under the rules of the Inter State Commerce Commission he is charged with notice of the terms and conditions of that contract, by reason

99 and by virtue of the quoted rates of \$170.00 which is the rate provided by the Chicago & Alton Railroad Company and other railroad companies in their general interstate traffic arrangements set out in the joint interstate tariff then in force, and duly published, filed with the Inter State Commerce Commission and published for the shipment with a limited liability and at a limited valuation of one hundred dollars per animal.

Motion overruled by the Court. To which ruling of the court the defendant by its counsel then and there excepted.

CHARLES T. SEAGO being first duly sworn in answer to interrogatories propounded by Albert Salzenstein, Esq. testified as follows, to-wit:

Q. Just state your name?

A. Charles T. Seago.

Q. Where do you live?

A. In Springfield.

Q. How long have you lived here?

A. Almost three years.

Q. What is your business?

A. I run a boarding bar.

Q. Are you acquainted with Mr. Kirby the plaintiff in this suit?

A. Yes sir.

Q. Are you acquainted with Mr. Stuttzman?

A. Yes sir.

Q. How long have you known those two gentlemen?

A. Well, I have known Mr. Stuttzman about twelve or fourteen years perhaps, and Mr. Kirby I have known of him a great while, I never knew him well until about the last three years.

Q. Do you know where Mr. Kirby's horse shoeing establishment is?

A. Yes sir.

Q. Where is it?

A. Well, on Jefferson street the second door east of 4th street on the north side of the street.

100 Q. Do you remember being present at any time in January 1906 when a conversation took place between Mr. Stuttzman and Mr. Kirby in relation to the shipment of a carload of horses?

A. Yes sir.

Q. You may tell the jury how much of that conversation you heard, what it was that you heard take place between them?

A. I don't remember how I came to go to the shop, whether I went to the shop with Mr. Stuttzman, the barber shop I shave at sometimes is not far from that barn, and he said he was going over to Kirby's, and I don't know that I had any business there, but anyhow I was going to the shop, we had a conversation there at the shed and I said I am going over as well as I remember, and when we stepped in the shop he said something to Mr. Kirby about that you are shipping just at the right time for your horses will be put on the fast train, or something about a fast train, I don't remember just the words, and Mr. Kirby says have you made all arrangements, something to that effect, and Mr. Stuttzman says I have not. Well He says if you haven't I will ship over another road, and Mr. Stuttzman says well I will look after that for you, or something to that effect, and Mr. Kirby said all right, as well as I remember.

Q. When was this conversation?

A. A day or two before Mr. Kirby shipped his horses as well as I remember, I don't know just what period of time.

Q. Do you remember when Mr. Kirby shipped his horses?

A. Remember the date?

A. Yes?

A. No sir, I remember the time well, but I could not call the date.

Q. That conversation was some time before that?

A. Yes sir.

Q. Mr. Stuttzman is the gentleman who sits there is he?

A. Yes sir.

101 Q. The dark complected gentleman with a moustache?

A. Yes sir.

Mr. PATTON: We won't deny his identity.

Mr. SALZENSTEIN: No, but I wanted to identify him.

Witness on cross examination in answer to interrogatories propounded by William L. Patton, Esq., testified as follows, to-wit:

Q. All you remember is that Mr. Kirby inquired whether he had made arrangements?

A. Yes sir.

Q. Mr. Stuttzman said he had not?

A. Yes sir.

Q. Mr. Kirby then said that if he could not make the arrangements, or did not make the arrangements he would ship over some other road?

A. Yes sir, something like that.

Q. Then Mr. Stuttzman said he would make arrangements?

A. Yes sir.

Q. Nothing said about what the arrangements were to be that you know of?

A. No sir.

Q. And that was about two or three days before the shipment?

A. Something like that I think, yes sir.

Mr. SALZENSTEIN: Do you remember the words that Mr. Stuttzman used when he said he would make arrangements?

A. Something like he would guarantee, or that he would see that he was taken care of Mr. Kirby said that is all right, as well as I remember the words.

SHERIDAN GILMORE being first duly sworn in answer to interrogatories propounded by Albert Salzenstein, Esq., testified as follows, to-wit:

102 Q. State your name to the jury?

A. My name is Gilmore.

Q. Where do you live?

A. Springfield.

Q. How long have you lived here?

A. It will be three years the 25th day of April.

Q. What is your business?

A. Horse shoer by trade.

Q. At what place do you work?

A. I work for Mr. Kirby.

Q. How long have you worked for him?

A. The 25th of April will be three years.

Q. Were you working for him in January 1906?

A. Yes sir.

Q. Do you know Mr. Stuttzman of the C. & A. Railroad, Stock Agent.

A. I know him by hearsay that is all.

Q. I call your attention to this gentleman sitting back there?

A. I saw him several times.

Q. Do you remember of his being in Mr. Kirby's place of business some time during that month?

A. He come in there two or three different times I think.

Q. Do you remember hearing any conversation between him and Mr. Kirby relating to the shipment of horses?

A. I heard him and Mr. Kirby talking over the shipment of some horses to New York State.

Q. Just tell what you remember about that conversation?

A. Well, there wasn't much conversation about it.

Q. Well the first one?

A. He seemed to be anxious to solicit the horses to ship for the C. & A. and he told Mr. Kirby—

Q. What was said in that conversation?

103 A. Mr. Kirby told him if he had not made arrangements to take him to New York City by way of this town of Joliet and put him on the fast train, fast horse special, the train run three days a week as I understood him to say.

Q. Was anything said as to the kind of horses?

A. No sir, nothing was said about the horses, just a good carload of horses.

Q. What else was there in that conversation?

A. He told Mr. Kirby, he says I will ship you by way of Joliet and connect you with a horse special out of Joliet the next morning by shipping out of here in the evening and get them into this town the next morning and he would make connection with this fast train to New York City and I forget what day he told him he would arrive in New York City but something like three days and three nights, and Mr. Kirby told him if he hadn't made every arrangement he wanted to know it, if you haven't he says I will ship over the Wabash road yet, but he seemed to be more anxious to get the load over his road, and Mr. Kirby told him if you have made those arrangements and guarantee so and so I will go with you, he said all right and walked out.

Q. When was this conversation you speak of?

A. Well sir, it was the last part of January 1906.

Q. With reference to the time when Mr. Kirby shipped when was it, do you know when Mr. Kirby shipped?

A. Yes, I know when he shipped, he shipped about the last week in January.

Q. In reference to that when was it?

A. Why, it was a day or two, two or three days before the carload of horses were out, were shipped out.

Q. Do you remember who else was present at that conversation?

A. Yes sir, I mean there was other men in there that didn't hear the conversation, they were too far away.

104 Q. Well, I mean was any one near there besides yourself?

A. Doc Seago, we call him Doctor, he is Mr. Seago.

Q. That is the conversation you have now given?

A. Yes, there was two or three other strangers in there at the same time, but I don't know who they were, they went away out of town men.

Q. You speak of Mr. Stuttsman being in there several times?

A. Yes sir.

Q. Was Mr. Kirby there on those occasions?

A. No sir, he happened to be out in the city somewhere.

Q. What was he in there for?

A. He asked me one time, I didn't know who the gentleman was so finally I asked Mr. Kirby who he was, and by making myself acquainted with him, he asked me for Mr. Kirby.

Q. All I want to know is if he inquired for Mr. Kirby on those occasions?

A. Yes sir, that is the way I got to find out who he was.

Witness on cross-examination in answer to interrogatories propounded by William L. Patton, Esq., testified as follows, to-wit:

Q. At how many conversations between Mr. Stuttsman and Mr. Kirby were you present?

A. Just one.

Q. That is the one you have testified to?

A. Yes sir.

Q. In which that thing took place you have stated in answer to Mr. Salzenstein's questions?

A. Yes sir.

Q. And that was about two or three days before the shipment of the horses?

A. Something like it prior to the time he got the car ready and ordered the car.

105 W. C. DUNHAM being first duly sworn in answer to interrogatories propounded by Albert Salzenstein, Esq., testified as follows, to-wit:

Q. State your name.

A. W. C. Durham.

Q. Where do you live?

A. Springfield.

Q. How long have you lived here?

A. Three years a little over.

Q. What is your business?

A. I am a horseman.

Q. Are you acquainted with N. T. Kirby the plaintiff to this suit?

A. Yes sir.

Q. How long have you known him?

A. O, I have known him for twelve or fifteen years I guess.

Q. Do you remember the shipment of these trotting horses by him over the C. & A. Railroad?

A. I do.

Q. The latter part of January, 1906, to New York City?

A. Yes sir.

Q. What do you know about that of your own knowledge, did you accompany that shipment?

A. I did.

Q. Now tell the jury what time you left Springfield here? What time you got to Joliet first?

A. We left here at 8:15 January 24th p. m. and arrived in Joliet at six o'clock a. m. the next morning.

Q. When did that carload of horses leave Joliet?

A. Somewhere around eight o'clock.

Q. In the evening?

A. In the evening.

106 Q. Where did they go from Joliet?

A. I suppose we went to a place called Lake.

Q. And how long did they stay at Lake or what time did you get to Lake first?

A. I could not tell that exactly.

Q. When did they leave Lake if you remember?

A. No sir, I don't remember that.

Q. Well now, after leaving Lake how did you travel?

A. We traveled by rail.

Q. What kind of train were you on?

A. Well I don't know it was in the night and I didn't take any particular attention to the train.

Q. Well, in regard to the stoppage of that train?

A. It didn't seem to be a fast train no.

Q. In regard to the stoppage of the train where did you first stop?

A. Well, I don't know where the first stop was.

Q. The first long stop?

A. The first long stop.

Q. Have you any memorandums made at the time?

A. Yes sir.

Q. You may refer to them and refresh your recollection?

A. Yes sir, my memorandum after we left Joliet commenced January 26th at Wayne eighteen miles west of Detroit at 11:25 a. m.

Q. What date?

A. January 26th.

Q. How long did you stop there at Wayne.

A. Well, I don't know how long we were there, but we were at West Detroit at 12:30.

Q. How long did you stay at West Detroit?

A. Just one hour.

107 Q. What was done at West Detroit if anything?

A. Nothing only a little switching.

Q. After you left Detroit where did you go, where was the next stop?

A. In Detroit at 2 P. M.

Q. How long were you in Detroit?

A. Well, I could not tell that, how long?

Q. About how long if you knew from recollection?

A. No.

Q. Do you know what was done if anything with the train at Detroit?

A. No I do not.

Q. Where did you next stop?

A. The next stop was at Windsor, Canada.

Q. What time was that?

A. At 5.15.

Q. And how long did you stop at Windsor, Canada, is Windsor, Canada right across the river from Detroit?

A. From Detroit.

Q. How long did you stay at Windsor?

A. I don't know that Mr. Salzenstein.

Q. Do you know what was done with the train while you were in Windsor?

A. No, sir.

Q. You don't remember?

A. No, sir.

Q. To refresh your recollection I will ask you if this was not a meat train?

A. Well, I rather think it was, yes, I think it was.

Q. Do you remember whether or not the cars were iced, ice put in the cars?

A. Yes sir.

108 Q. What was done?

A. They were iced.

Q. You don't remember when you left Windsor?

A. At 5.15, no, we were at Windsor at 5.15, I don't know when we left.

Q. When did you leave?

A. I don't know.

Q. Where was the next stop?

A. I didn't keep any more memorandum of it then until the next morning at 6.45.

Q. Where were you then?

A. We were then at Windsor.

Q. At Windsor at 6.45 the next morning?

A. Yes, sir.

Q. You didn't leave Windsor until 6.45?

A. No sir, there is where Mr. Kirby paid our fare to St. Thomas before we left.

Q. Where was the next stop you remember or have a memorandum of?

A. The next stop was in Pillsbury, Canada.

Q. What time did you get there?

A. We were there at eight P. M.

Q. How far is that from Windsor?

A. I don't know.

Q. How long did you stay there?

A. There just one hour.

Q. What was done with the train if anything during that hour?

A. Well, we were switched around icing up cars.

Q. Where was the next stop you have a record of?

A. About ten o'clock A. M.

Q. The next day, where was that?

A. Ten o'clock P. M. it was ten o'clock P. M.

- 109 Q. The same day?
 A. The same day, yes sir.
- Q. Where was that?
 A. That was at St. Thomas, Canada.
- Q. How far is that from the last place if you remember?
 A. I can't tell you.
- Q. How long did you stop at St. Thomas?
 A. Well, I don't think we were at St. Thomas very long if I remember rightly. I haven't any memorandum of it at all.
- Q. Where is the next stop you have a record of?
 A. The next stop was at Buffalo.
- Q. What time did you get there?
 A. No, hold on, we were not at Buffalo on January 27th we were at 6.45 A. M. still in Canada about an hour later we learned we had been laid out between St. Thomas and Buffalo on account of a wreck at St. Albans, Canada.
- Q. What time did you get to Buffalo?
 A. About 9.15 I should judge in the morning.
- Q. How long did you stay at Buffalo?
 A. Well, I could not tell just how long we stayed in Buffalo.
- Q. Have you any recollection as to whether it was a long or a short time?
 A. I have a recollection nearly every stop we made was long enough.
- Q. Do you remember whether anything was done with the train or not at Buffalo?
 A. Nothing more than icing up the cars again.
- Q. How was that done, tell the jury how they would ice those cars.
 A. There is an ice house right along the railroad, they would just pull up the car of meat, I suppose it was meat, I never investigated, and ice two of those cars to keep them cool.
- 110 Q. How would they put that ice in there in place?
 A. From the ice house through a chute.
- A. Well, in doing that how were the cars moved?
 A. Well, they would just move up the next car.
- Q. Now you don't remember what time you left Buffalo?
 A. No sir.
- Q. Where is the next stop you have a record of?
 A. The next stop was at Niagara Falls.
- Q. Is that this side or the other side of Buffalo, the stop at Niagara Falls before you get to Buffalo or after?
 A. After I think.
- Q. What does your record show?
 A. It says Niagara Falls at 10.45 A. M.
- W. What day was that?
 A. I have not got the date here.
- Q. Well from Niagara Falls, what time did you leave there?
 A. We left there about 11.25.
- Q. Where was the next stop you have a record of?
 A. I guess we were at Niagara Falls however before we were at

Buffalo, we were housed up in the horse car and I could not tell all the time where we were.

Q. Now after leaving Buffalo where was your next stop that you have a record of?

A. Well, the next stop would be Niagara Falls.

Q. After leaving Niagara Falls and Buffalo where was the next stop?

A. The next stop was at Albany, New York.

Q. How long did you stop there?

A. We were there about six hours.

Q. What were you doing while you were there, what was being done with the car if anything?

A. Nothing at all.

111 Q. Now about what time did you leave Albany?

A. We left Albany about six o'clock or 6.30.

Q. And what was done if anything about icing the cars at Albany?

A. Well they iced the cars all up there.

Q. The icing was done the same way you describe it at other places?

A. Yes sir.

Q. Well, what time did you get into New York?

A. What time did we get into New York?

A. Yes, New York City?

A. We got in New York City about six o'clock.

Q. At the place where the car was switched off what time did you get there?

A. That was the station we were first at, 130th street.

Q. About what time was that do you remember?

A. That was six o'clock.

Q. In the morning?

A. Yes sir.

Q. On what day of the month or week?

A. January 29th I think and know.

Q. Tell the jury the condition of these horses along the road prior to getting to New York and when you got there?

A. Well the horses rode fine from here to Joliet, and they stood up pretty well and behaved themselves nicely at Joliet while standing on the switch, we were not switched around there, and they rode very well until we got to Canada, of course they began to get a little tired and the longer they were on the road the tider they got.

Q. Well, did you notice any sickness amongst any of them?

A. Not until Sunday evening.

Q. What did you notice then?

112 A. I noticed we had one filly that appeared very sick.

Q. What was the name of that filly?

A. Lou Blake.

Q. In what way did she show sickness?

A. Well, her nostrils extended and her ears kind of down, didn't seem to have any life to her just at the time.

Q. How was that condition when you got to New York?

A. It was getting worse all the time, it was very bad.

Q. When you got to New York was any veterinary called?

A. Right away.

Q. Do you remember his name?

A. No sir.

Q. At what place?

A. He was an assistant of Doctor McCully's is all I know.

Q. What was the condition of these other horses when you got to New York?

A. Well, outside of their being tired and kind of dead on their feet there was nothing serious the matter with them.

Q. Were you present when they were taken to the Madison Square Garden?

A. Yes sir.

Q. What was their condition then?

A. O, they were tuckered and hadn't time to fill up yet.

Q. How about being tired and knotted up?

A. Yes, they were tired and sore.

Q. What effect had their condition on them when they were shown at Madison Square Garden?

A. Very bad effect.

Q. In what way, tell the jury?

A. The horses were not able to extend themselves and show to what they should have done.

113 Witness on cross examination in answer to interrogatories propounded by William L. Patton, Esq., testified as follows, to-wit:

Q. When the horses got to Joliet you say they were in good shape?

A. Yes sir.

A. L. THOMAS being first duly sworn in answer to interrogatories propounded by Albert Salzenstein, Esq., testified as follows to-wit:

Q. State your name to the jury?

A. A. L. Thomas.

Q. Where do you live?

A. Omaha, Nebraska.

Q. How long have you lived there?

A. Seven years.

Q. What is your business?

A. Farming, trainer and developer of trotting horses and buying and selling horses.

Q. How long have you been in the business of training and developing trotting horses and handling and developing them?

A. About twenty five years.

Q. What connection if any had you with the Madison Square Garden sales in New York City?

A. I am connected with the Fasig-Tipton firm in the capacity of showing and handling of the horses that are offered there for sale.

Q. How long have you been so connected with them?

A. Ten years.

Q. How often are these sales held in New York City?

A. O, the latter part of November and first of December which we call the Old Glory sale, and the last week in January and sometimes merging into one or two days in February called the Mid-Winter sale of each year.

114 Q. The latter part of November and first of December, and the latter part of January and first of February?

A. Yes sir.

Q. Will you describe to the jury the manner in which those sales are conducted?

Objected to by defendant on the ground that the manner and conduct of these sales is not a matter of relevance or importance or admissibility in this case.

The COURT: I am of opinion the objection is well taken, if he was present when these horses were sold.

Mr. SALZENSTEIN: He was present, and I want to show if any condition in the sale of these horses to show they did not bring the fair market value, that is the purpose of it.

The COURT: I think it would be entirely sufficient in chief at least, to show how these horses were sold at that public sale at that public market, how they were sold, and if they want to raise any question about it it will develop later.

Mr. SALZENSTEIN: Well, conducted in any way different from ordinary sales to show there was no collusion, in the examination of Mr. Kirby Mr. Patton intimated something of that sort and I wanted to cover it.

Mr. PATTON: I stated in the argument such thing might take place.

The COURT: I think it is entirely sufficient in chief at least for you to show, having shown this to be a sale established and all that, for you then to show the manner in which these horses were sold, I don't want to get it involved any further than is necessary.

Q. How long have these sales that you speak of been conducted at that place?

A. Under the present administration twelve years I think.

115 Q. What kind of sales are they with reference to being private or public and the number of people that come?

A. They are called combination sales, horses are consigned from nearly every state in the union where horses are raised, from California to Maine.

Q. What notice is given to the public of those sales?

Objection by defendant to the notice given to the public. Objection sustained by the court.

Q. Have you had any experience in the shipment of horses for long distances, high bred horses, trotting horses?

A. All kinds of horses for the last twenty five years.

Q. What has been the nature and extent of your shipments?

A. I ship a carload nearly every year to the New York sales and frequently ship one and two car loads back that I buy down there.

Q. What effect if you know has a long shipment or long stops on horses of the character I have mentioned, in shipping them a distance of nearly a thousand miles.

Objected to by defendant, that is hardly a subject for expert testimony when we have gotten people the testimony of people who were with the horses as to the actual fact, it is entirely speculative, depends on the individual horses, the time of the year, and depends on so many elements that it could not be made identical, and we object to the general effect.

The COURT: As to the effect on these horses you had the testimony of two witnesses as to the effect it had on these particular horses, does not that meet the requirements for the present at least?

Mr. SALZENSTEIN: To some extent, this witness also shipped a load on this same train that Mr. Kirby's horses were to go on, and

116 I want to follow that up by asking him in regard to shipments of horses by this other train so as to show as well as we can that this condition Mr. Kirby speaks of was occasioned by this slower means of transportation.

The COURT: Well, proceed for that purpose within reasonable lines.

To which ruling of the Court the defendant by its counsel then and there excepted.

Q. What effect if you know has a long shipment or long stops on horses of the character I have mentioned, in shipping them a distance of nearly a thousand miles?

A. Well, for every stop and every hour longer they are on the car of course it makes a vast difference, for the simple reason physically they become more tired, all classes of horses, and I ship cattle also, in stops they become uneasy, one will lie down and are liable to injure themselves, they become fretful and get warm, that holds with all classes of horses, it don't make any difference what kind of horses.

Q. Any difference in regard to high bred horses?

A. Not exactly. I have had the same condition arise in all kinds and classes of horses.

Q. Now Mr. Thomas, in your shipments east have you ever had occasion to ship by way of Joliet on what is known as the fast horse train on the Michigan and New York Central Railroad?

A. Yes, I have shipped that way a great many times.

Q. Now you may tell the jury about that shipment, about the movement of the trains, stoppage and the like and what time they reached destination?

Objection by defendant to what preceding experience of this gentleman has been with regard to making railroad connections which are subject to change at a moment's notice, and the time at places vary and conditions vary.

Q. No, I am speaking of this very train, the horse special we were to be placed on?

117 Mr. PATTON: Just so, and his shipments have been from Omaha, a connection entirely different, the entire environment different and we object.

Mr. SALZENSTEIN: I simply ask him from Joliet by way of the Michigan Central and the New York Central on what is known as the fast horse special.

The COURT: I am inclined to the view that you might interrogate him as an expert as to the probable effect, probable difference in the condition in which the horses would arrive upon the scheduled time of this shorter train, and the time in which the cars actually arrived there with the horses, I am inclined to think that is evidence in chief, it is not competent for him to give his past experience, he testified here as an expert.

Mr. SALZENSTEIN: And also as having actual knowledge of this particular train, one of the trains, I presume that these gentlemen will agree that if these horses had been shipped on the horse special they might have reached there in the same condition, we want to show how that horse special travels and also the condition of the horses.

The COURT: You can have in evidence what the schedule time of the train was, prima facie, tentative procedure, that it would make its schedule time, this man testifies as an expert and he may in my opinion safely be allowed to give his opinion as to the difference in conditions the horses would arrive on this fast schedule time and the conditions you say they did arrive on this other time, but I do think it is entirely improper for him to give detailed experience he has had in making other shipments upon this same train.

Mr. SALZENSTEIN: Something was said by Mr. Patton both in his argument and during the examination of Mr. Kirby in regard to this particular train that leaves Joliet in the morning connection with the horse special on the Michigan Central and he says the Michigan Central don't carry horses on that train, and to carry on that train if indulged in would be bad for the horses, I want to show by this witness the condition of horses on that train and the effect of the carriage on those horses.

The COURT: I cannot call to mind any rule of evidence that would make that competent, experts testify upon a hypothetical state of case, and do not give individual instances or experience unless in cross-examination about it they might test him by his experience and by his observation and all that, it seems to me if you use him in chief for substantive evidence you have to rely on hypothesis.

Mr. SALZENSTEIN: I will proceed first on the theory of expert, and then proceed on the other theory and the court can make the record.

The COURT: He had no experience either this identical shipment, and cannot testify about it, this shipment was not made by the fast route, therefore it cannot be treated as having done so, there is a fast route, this man had qualified as an expert shipper, he has testified as to the effect of a prolonged journey, he may testify as to the effect of a quicker and more rapid journey.

Mr. SALZENSTEIN: We want to show not only the effects of the journey but he knows about the schedule time of this fast train.

The COURT: He could not tell how it was stopped on any particular trip.

Mr. SALZENSTEIN: No, but we will follow that up, we have the telegraph schedule on that particular train.

The COURT: I think the scheme I have given you is the only safe scheme, I have had a great deal of experience in trying to get along with expert testimony where I allowed the expert in chief to give his experience in road cases.

119 Q. Assuming that this horse special left Lake at 3 P. M. on January 25th, reached East Buffalo at 4.20 P. M. on January 26th was there unloaded and left at 6.20 P. M. the same day, and reached New York on January 27th, at 8.20 P. M. what would you say would be the condition of the horses compared to what it would be upon a train leaving Lake at between 12 and 2 o'clock on the morning of the 26th of January and reaching New York on the morning of the 29th of January between 6 and 8 o'clock in the morning?

A. I would like to ask a question, that would be a difference of about 48 hours in transit wouldn't it?

Q. The difference in time?

A. Yes.

Q. Somewhere in the neighborhood of 40 hours I should judge.

A. Well, my experience would be in shipping a car load of horses that length and that distance that any time you was out twelve to thirty six hours that the danger of injury is materially added to, for the simple reason the horses are becoming tired and worn out and it is for that special reason that this horse special had been gotten up by the Michigan Central whereby we can ship horses to those points without wearing them out, and for every twelve hours you would add I would not say as to what injury could be done, in some cases I have seen horses that it did not do any injury, while in numerous cases it has decreased the value of my horses an unknown value as far as that is concerned, in that class of horses.

Objection by defendant to what happened to his individual horses in numerous cases, and ask that it be stricken. Objection sustained by the Court about what he says about the effect it has had on his own horses in his various experience, that is not to be considered by the jury, that is stricken out.

120 Q. Was that condition that you speak of, or would that condition be lessened or aggravated if those horses had been loaded on cars on the evening or afternoon of January 25, 1906, and had been in transit from Springfield to Lake, a distance of probably two hundred miles up to the time that they left Lake at from 12 to 2 o'clock P. M. on the morning of the 26th?

A. Yes sir, the danger is greater for the simple reason after having been on the car the first night they become more uneasy and restless, standing, while if they could be moved if possible eight nine or ten miles and started again they would only become restless, but stand-

ing and changing from one foot to the other you understand is where the restlessness begins, if they had to stand twelve hours or eight hours rather they would stand forty minutes at a time forty minutes at a time or sixty minutes standing between and so on.

Q. I want to show if I can there are very few stops and those of short duration with this horse special as compared with the meat train.

The COURT: Probably that is included in their scheduled time itself.

Q. I am trying to get it if I can, these gentlemen stated they would produce it.

Mr. PATTON: Well, the agent representing the Michigan Central is here and says he has the schedule time of the Michigan Central and the New York Central, has it down at the hotel, we will produce it if you desire.

Q. I think it is better for us to have it so we can cover every phase of this matter showing the difference between these two trains, I will proceed now; did you see this fourteen head of horses of Mr. Kirby's with reference to which suit is brought?

A. Yes sir.

Q. Where did you see them?

121 A. I first saw them at Madison Square Garden New York.

Q. When?

A. Well, I am not certain as to the date, it was the morning of the day that they were sold.

Q. What condition were those horses in?

A. Well, they were bad.

Objection by defendant to the answer. Objection sustained by the Court and the answer stricken.

Q. Tell the jury what you mean, we don't want your conclusion, just describe the condition?

A. I will answer that question in saying how I saw them.

Q. How did they appear to you when you saw them there?

A. Mr. Kirby came to me on the morning of that day and says—

Q. Don't tell what he said.

A. I have got a string of horses here I want you to exercise and try before the sale, I took each one of these individual horses and exercised it, and I found that they were sore as we call it in trotting parlance, could not untrack themselves otherwise could not extend themselves, and I said to Mr. Kirby—

A. No just what you saw?

A. I tried each one individually and put them away and reported upon their condition to Mr. Kirby as I found it.

Q. What was the condition that you found there, then and there?

A. I have tried to describe them by saying they were sore, tired, worn out no life whatever.

Q. What in your opinion produced that condition?

A. The shipment.

Q. What kind of shipment?

A. Well, I don't know what kind of shipment, it was a shipment pure and simple, for the reason I didn't know at that time and only what I have heard here what it was.

122 Q. Assume those horses left Springfield on January 25th at

8 o'clock loaded in a car at 4.20 P. M. of that day, then taken to Joliet, reaching there at 6 in the morning, leaving Joliet in the afternoon and running to Lake, and being put on a train, leaving Lake from 12 to 2 o'clock known as the meat train, which stops at various places for a considerable length of time, and at some of those places the cars were iced up, the cars being moved forward one at a time, and not reaching New York City until 6 or 8 P. M. on the morning of the 29th of January what would you say as to that causing the condition you saw?

A. Well, I should say that caused it for the simple reason that was the main thing as I stated a moment ago thirty hours longer on the train with frequent stops, longer stops, I would say that was the direct cause of causing or aggravating the cause.

Q. Now did you notice one of these horses called Lou Blake?

A. I did.

Q. Did you notice anything about her in addition to what you have stated about the other horses?

A. Yes sir.

Q. What was it you noticed about her?

A. I noticed she had been in the hands of a veterinary surgeon a mustard plaster had been applied at each side owing to the fact that she had caught cold and had what we call pneumonia.

Q. Now did this condition have any effect on the selling prices of those horses on that market at that date?

A. I will answer as to a portion of them, I cannot recollect all of those horses, fourteen horses.

Q. I don't ask you in detail, just answer that question?

A. I would say yes.

Q. Take the mare known as Lou Blake, what in your opinion was the difference in her market value in the then condition she
123 was in and the condition that she would have been in had she had the shipment, the much shorter shipment you have spoken of?

Objected to by defendant on the ground that no man on earth be an expert or non-expert could answer that. Objection sustained by the court, the Court remarking the inquiry should be what would be the difference in value in the condition as she then was and her condition if she had been in reasonable condition under the circumstances.

Q. What was the difference in her market value at that time and place between her then condition and had she been in reasonably good condition?

A. I will answer that by saying had she got there in reasonable condition her market price would have been from five or six times

what it was, my recollection is she brought between four and five hundred dollars, I cannot state positively as to that for other reasons.

Q. What do you say she would have brought on the market if she had been in reasonable condition?

A. From twenty five to thirty five hundred dollars.

Q. Now take the horse known as Rythmac Bell you remember that horse do you?

A. I remember him well sir.

Q. What in your opinion was the difference in value on that day and place in the condition that he was in and what would have been the value had he been in reasonably good condition?

A. Can I make a statement in regards to the markets down there what a great deal of this hinges on the value of the horse?

The COURT: It is entirely sufficient in chief for you to give your opinion now, and if they want any particular reason they will ask you for it.

A. In my judgment the difference in the price that he brought and what he would have brought had he shown properly would have been from two to three hundred per cent or in other words from three to four thousand dollars.

124 Q. Are there any of these other horses that you remember by name?

A. Yes I do there is two other- that I do.

Q. What are they?

A. One the mare called Varinique, and the other one is that getting the name has gotten away from me.

Q. Take the first one?

A. Verinique, I could tell the breeding &c. and the other mare is a mare of the dam of Verinique.

Q. Take Verinique first?

A. Verinique, the difference probably would have been from fifty to two hundred per cent.

Q. Do you remember what Veronique sold for?

A. I do distinctly, \$1225.00.

Q. And what in your opinion would she have brought had she been in reasonably fit condition at that time and place?

A. From fifteen to twenty five hundred dollars.

Q. Now the dam Cornelia Bell, did you notice her also at that time?

A. Yes sir.

Q. What in your opinion would be the difference in that case?

A. Well I remember a hundred to a hundred and fifty dollars.

Q. Do you remember any of the other horses?

A. I remember a lot of the other horses, I remember them in my mind, but I could not identify them by their names, if their breeding was read over to me I could tell and place some of them.

Q. Easter Bell?

A. Yes, I remember Easter Bell.

Q. What in your opinion would have been the difference in value in her case if she had been in reasonably fit condition?

A. Anywhere from a hundred and fifty to two hundred dollars.

Q. Now a horse call- Woodford Bell?

A. I could not place him.

Q. He is by Alberton?

A. I could not place him.

125 Q. Do you remember a mare by the name of Bell Martin by Council?

A. I have a slight recollection but I would not pass any opinion now.

Q. Do you remember a black filly by Cressis?

A. What is the dam of that one?

A. Dam Woodford Bell by Alberton?

A. Yes, I remember that mare.

Q. What would you say about that filly in regards to the question I have already asked you, what would be the difference in market value?

A. A couple of hundred dollars, two hundred and fifty dollars.

Q. I call your attention to a brown colt by Red Tell? do you remember that colt?

A. It might have made no difference, or it might have made a difference of fifty or a hundred dollars, I remember that colt on account of his size.

Mr. PATTON: You say it would make a difference?

A. It might have made a difference and it might not.

Mr. SALZENSTEIN: A bay filly by Red Bell, Bell Hart, Red Martin?

A. I cannot place him, no sir.

Q. Do you remember that?

A. No, sir, I don't remember it.

Q. There was a brown colt by Torgantic by Simons, dam Easter Bell?

A. I remember him.

Q. What do you say in that case?

A. In that colt it might have made a difference of a hundred dollars. I am satisfied if he could have shown.

A. A brown filly by Torgantic?

A. I remember her sir.

Q. What would you say in that case?

126 A. The same thing.

Q. Now a horse Red Star by Beausant by Bow Belle, Dam Reply by Princeton, do you remember that animal, what would you say in that case?

A. Well, I would say it would make no difference the condition he was in.

Q. Do you remember a mare by the name of Bertha Ceaven by Guy Corbitt by Guy Wilkes, dam Isabel by Aladdin?

A. No, sir, I don't remember her.

Q. Now you might tell the jury how this sale was conducted in regard to these horses that you have mentioned.

A. That is the manner in which they were shown before the public when they are sold &c. is that what you mean, the majority of the horses sold at Madison Square Garden are sold purely upon what they

can show, the breeding shows for it-self, and the value is in what they can show, we put what we call a biting harness on, light harness with a long set of lines. I ride a horse and drive them ahead of me, ninety per cent of the horses are shown that way in the track that is the eighth of a mile in circumference, they have it laid out in the same way that a half mile track is with short turns and long stretches, and outside of the breeding the value of the horse and what he brings is what he shows?

Q. Now take this consignment, were they shown?

A. Every one of them.

Q. In the regular manner?

A. Yes sir, every one in the manner I have described.

Q. In the manner of being cried for sale was there any difference between these horses and the others sold there?

A. None whatever sir.

Witness on cross-examination in answer to interrogatories propounded by WILLIAM L. PATTON, Esq., testified as follows to-wit:

127 Q. Now Mr. Thomas, as I recollect, I don't know much about the horse business, as I recollect you said that horses standing in a car for a long ways deteriorate rapidly, that that hurt them?

A. After a certain time in transit, yes sir.

Q. Well is it not true that a careful horse shipper does not load his horses until just immediately or shortly before the train leaves because the wait prior to the shipment is bad on them?

A. I will answer by saying we have not got control of what time to ship them, we have to be governed by the time and place, the railroad companies rule that.

Q. But that is not what I asked you?

A. We try to load them as near as possible to the time they move the train as the railroad company will allow it so as not to have them stand any longer, yes of course.

Q. And if horses are loaded along about four o'clock in the afternoon and stand from then until about eight o'clock at night they would start off under a handicap on account of the loading is that it?

A. Hardly ever.

Q. You think that would not hurt them?

A. Hardly ever.

Q. And I don't quite understand about the stop, the intervening stop you said something about an intervening stop, if they were long or short, which is it?

A. My idea what I was trying to impress is this, a horse that has been in transit twelve or thirteen hours and then they had a stop for a long time, they would become more uneasy than if they were going, for instance they would move a few miles in transit understand and then had a short stop and start again and so on all the way along, that would be better than stopping them altogether and letting them stand still.

Q. That is, the motion of the train is better?

128 A. Yes, the motion of the train is better than standing still.

Q. Now in speaking of the values of the horses, you never saw any of these horses until you saw them in New York did you?

A. No sir.

Q. What kind of horses they were and what their action was and capabilities and all that sort of thing you don't know only simply from what Mr. Kirby told you, and their breeding?

A. Their breeding and what somebody has told me that had been to see them before they were shipped.

Q. You have not a single item of information of your own knowledge as to what those horses were like when they left Springfield?

A. Only as far as their speed abilities were concerned.

Q. That is a question of record, you take that from the record?

A. No, I beg your pardon, there was only one horse in this lot that had a record.

Q. What did you know of your own knowledge of their speed abilities before you saw them?

A. I will answer this question in reference to horses, I buy horses to campaign upon the grand circuit to trot myself, two animals in particular I had sent a gentleman here to see them with a view of buying them.

Q. But what I ask you is you had not individually yourself with your own eyes seen any of the performance of any of these horses?

A. Oh, no.

Q. Your basis of valuation is upon what somebody has told you about them and their breeding?

A. And their breeding.

Q. Now why is it that, take for example Lou Blake, you say that if she had been in reasonably good condition she would have brought from twenty five to thirty five hundred dollars?

A. Yes sir.

129 Q. That is based on what somebody told you about what Lou Blake's performances had been, and what her action was and what her condition was when she left Springfield?

A. And what her earning capacity would be in the future.

Q. That is purely speculative?

A. Purely speculative but what she was eligible to.

Q. A large portion of this valuation you put on these horses is purely speculative as to how they might turn out as an investment?

A. Yes, the same as you make any investment of property, corn or anything else.

Q. The investment proposition with a race horse is what stakes they can win?

A. Yes sir.

Q. So that the valuation you put on these horses is based on their ability to win stakes in races?

A. In a manner yes and what they are worth for breeding purposes for high breeding.

Q. Breeding purposes comes about after they have lost usefulness on the track as a general proposition?

A. No sir, not general.

Q. So that the valuation of twenty five to thirty five hundred dollars on Lou Blake is put on her primarily, not primarily, but one element is her ability to win money in a horse race, and secondly her ability to breed good colts, that is what the basis of valuation is; now how is it that you make such a wide range in giving your estimate of what her value would have been had she been in reasonable condition, you say from twenty five to thirty five hundred dollars, a difference of a thousand dollars.

A. Yes sir.

Q. What is the range, what occasioned this?

A. The reason is this, I answer within my own judgment, because I was going to pay twenty-five hundred dollars for her myself.

130 ———: Now I move to exclude the testimony of this gentleman on the ground that his basis of valuation is based on the offering price he intended to make on the question of Lou Blake.

The COURT: I would not allow him to give that in chief, and you can disclaim it if you want to.

Mr. PATTON: I will disclaim it and ask that the jury be instructed not to consider it.

The COURT: Gentlemen of the jury, the answer of this witness that he himself would have given twenty five hundred dollars for this mare, that answer is disclaimed by the attorney to whom it was made in response to his question on cross examination and the Court instructs you that you are not to consider that as evidence in the case.

Q. Aside from any personal consideration of desiring to purchase this horse, how do you explain that wide range between twenty five hundred and thirty five hundred dollars range of a thousand dollars in value of one individual?

A. Knowing well the market the number of years I have been there and knowing there are other people besides myself buying horses I have tried to buy horses that I tried to buy at twenty five hundred and gave seventy five hundred for them before I bought them because others wanted them also.

Q. So that the valuation of these animals was speculative on the kind of people and bidders that happened to be at this sale?

A. It wasn't speculative because you have struck out what I have stated because I know what I was going to bid myself, I am positive I had one bidder you understand.

Q. Now I disclaim that.

The COURT: Let it be stricken out.

Q. The condition governing the price of these horses were speculative on the people who happened to be at that particular sale on the days they happened to be put up, is that the idea?

131 A. Every horse that is sold is a speculation for the simple reason there is no price attached to them and the highest bidder gets them invariably, every one of them would be a speculation, every horse sold there, there is no price attached to them at all.

Q. So it arises out of this thing, the prices and variations of prices arise out of the competitive bidding at this particular sale?

A. That is it exactly sir.

Q. And these horses have no regular market value?

A. Oh, yes they have a market value, for instance I come here to buy that animal and know her, what they ask for her before she left here, she has got a market value.

Q. That is an asking value, is there a market value for this class of horses in the same way there is a market value for draft horses?

A. Most assuredly there is.

Q. Then what was the market value irrespective of this particular sale?

A. Twenty five hundred dollars.

Q. Not thirty five hundred dollars?

A. Twenty five hundred dollars because I know that was the market value.

Q. Where was there any market, open market for horses of that character?

A. You could ship them to any market in the world if you had that kind of horses and I will assure you of a dozen people that would have been there to have bought it, myself included, you could have put her in a sale stable here and said she was to be sold there or for sale.

Q. Is there any difference in the market value of that class of stock in Springfield and New York?

A. Not any difference, only the aggregate and lot of people that go to a central point to get those horses instead of going to where they have only one horse to buy, you have a chance to buy eleven hundred of that same class of horses.

132 Q. Does not that fact that there are a large number of horses in competition in the sale have a tendency to reduce the value of the horses?

A. It has a tendency to enhance the value of the horses.

Q. Because more opportunity to buy more horses?

A. Because you have got more opportunities of more buyers generally they will buy more horses, gentlemen that will buy horses and pay up to ten thousand would not come from Wall street New York to Springfield to look at it, consequently they come there.

Q. Then the prices at the Madison Square Garden are prices that are made or depend largely on the fact that there are eligible purchasers at that particular point at that particular time is that it?

A. Yes sir.

Q. And that they will pay higher prices for animals than you can get down in the country?

A. No, that would not cover the point, it means that they get more people to bid upon those horses and when there is two or three or five or ten people want the same horse you will get more for them than if you only had one man.

Q. Then it resolves itself into this, there is a competition between bidders?

A. Yes sir.

Q. And it raises the price of the animal, is that it?

A. It raises it in that way yes sir.

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Q. Now this Rythmic Bel horse?

A. Yes sir.

Q. You say in condition he would have brought three to four thousand dollars.

A. Yes sir.

Q. Well, in Rythmic Bel you make a range of his value from three to four thousand dollars?

A. Yes sir.

Q. Is that the same basis on which you gave the range of value to Lou Blake?

A. Exactly.

Q. And so on down through these horses described?

A. Yes sir.

Q. Now did the stake winning proposition effect the value of those horses that were in that class of horses, how many of them were horses whose value was affected in that way?

A. That could have been entered in stakes, all these younger horses would have been, could have been probably, but breeding cut a material figure in regard to the first value of the horses, taking the case of Rythmic Bel you will get into the breeding line, if you follow that up and if you get a dam say from—

A. No, I don't want to know anything about that?

A. Well that is the end of it, that is one reason why I state the price, a yearling is a yearling, but one I would give thirty five hundred for it if it just could walk and I didn't see it further at all, and the other one I would not offer a hundred dollars for, both being as good individually to look at as the other.

Q. On account of their breeding?

A. On account of their ancestors, yes sir, I would give thirty five hundred dollars for a sucking colt and offer others a hundred dollars and both bred as standard horses.

Q. I understand you to say as to these horses you have only the word of somebody else as to what they were when they were in Springfield?

A. When they left here, yes that is all.

Q. And your basis of valuation is upon that basis?

A. Our basis of valuation is upon what is their breeding and what they had done here that an expert had seen and reported to me and what they would show down there to satisfy me, I was paying the money, consequently had they shown what the report was here

I could have told you nearly what they would have brought
134 as far as I am concerned, somebody else might have gone further, but knowing the market as well as I do in that time, well within reason, I want to be reasonable, I think you would be surprised if I would say ten thousand for Rythmic Bel, I know you would.

Q. I have been surprised all the way through.

A. Well that may be.

Mr. SALZENSTEIN: You speak of ten thousand for Rythmic Bel you predicate that on what you have seen and know and what transpired subsequently?

A. I will answer that by saying I was mistaken that I did not buy him that is all, I should have bought him even in that condition and taken may be a little more speculative chance.

Mr. PATTON: Then he was worth more money in that condition that he brought?

A. No.

Q. You say you made a mistake in not buying him at more money?

A. For the simple reason he recovered after a long rest and a lot of care you understand and the next year and came out and done something.

Q. Then according to your view he was worth more money at the time he was sold than he brought?

A. No, he wasn't worth more money because he didn't bring any more.

Q. Your idea is he was worth what he brought?

A. What he brought in that condition.

Q. Any horse is worth at any of these sales what he brings?

A. In the condition and the way he shows yes sir.

Q. An entirely speculative market?

A. I stated that before yes sir.

Mr. SALZENSTEIN: When Mr. Patton speaks of a speculative market what do you understand by the term speculative?

A. Well you speculate, I go and buy foals to win money, that is I bid a hundred dollars and win a thousand. I buy a piece
135 of property for seven thousand dollars that somebody gives me fifteen thousand for in two weeks, that is speculative, I give what the market value is at the time and sell it for what I can get.

Q. When you speak of speculation you mean the possibilities that these animals might afterwards achieve?

A. Certainly.

Q. Taking these animals at the condition, place and time did they have a market value?

A. They had a market value the market I claim is what they bring, that is their market value.

Q. What made these animals, what is it that enters into the mind of the buyer in bidding on them, what is it?

A. First of all was their breeding, second of all is their soundness and individuality, further more than that is what they can show we are buying them for trotters or pacers and consequently we want to bring them there in condition to show their gait, there is various gaits and one horse is similar bred to the other you would have one you would give a thousand for and another ten which is out of gait.

Q. Take the mare Lou Blake which has been mentioned, what would make that animal desirable and cause people to bid on her had she been in reasonably good condition at that sale at that date?

A. She not only was eligible to stakes but actually entered and paid up according to the book in something like thirty seven or forty thousand dollars' worth of stakes, making her eligible to them and

possible chances of winning a portion of them or a portion of that money, she had already shown good records.

Objection by defendant to the testimony of her being entered with a possibility of winning as an element of her value, it being wholly a gambling transaction and not a part of the legal valuation of a horse or any other piece of property.

136 Mr. GRAHAM: Mr. Patton brought it out on cross examination as one of the elements of value, and the answer to the question was that she was eligible to winning stakes, we have a right to find out what they mean, what value it might be.

Mr. PATTON: If it turns out that element of value is an element of which the law has no right to take cognizance we have a right to object.

Mr. GRAHAM: Winning a stake at a race is not gambling.

The COURT: It depends on circumstances, if in the form of a premium it is not gambling.

Mr. GRAHAM: We are bound to put the most favorable meaning on the use of it, every stake here at the State Fair is a stake.

The COURT: Well the objection is overruled.

To which ruling of the Court the defendant by its counsel then and there excepted.

Mr. SALZENSTEIN: You have mentioned one of the things that made Lou Blake desirable was her entry?

A. Well, the other reason her value would be decreased danger was she might not live twelve hours.

Q. In her then condition, now you said something about a record she had?

A. I said the record that she had obtained here as a two year old you understand every horse man in the United States had knowledge she was eligible to those stakes had she come then in reasonable condition she would have brought the amount of money I have mentioned or more.

Q. You speak about a large number of buyers being present at this sale for the purpose of purchasing horses, are there any more classes of horses more desirable than others and would create a greater competition?

A. Yes sir.

Q. What kind?

A. Pure bred horses are certainly more competitive, more possibilities of winning stakes and eligible and that show the speed that would draw attention to the animal as being a factor in these
137 stakes which would be another.

Q. Well take these horses you have named, Lou Blake, Rythmic Bel, Veronique and Cornelia Bel, what would you say as to them?

A. Well Cornelia Bel she was sold apparently as brood mare.

Q. Well take the others then?

A. The others would be all for trotting purposes, understand Cornelia Bel might be bought for somebody to race, there is people

who buy to put them on to race apparently and then for breeding purposes also.

Q. The question I asked you, what I was directing your mind to was whether or not this class of horses was such a class of horses as would lead to considerable competition?

A. Lead to competition by the best buyers in the United States, buyers of that class of horses.

Q. Why?

A. On account of the breeding and again with the possibilities for using them for trotting purposes.

Q. How many kinds of horses are shown at that sale or anywhere else?

A. Oh, they sell ninety per cent of the horses are trotting horses, well bred horses, they do get some horses, well kept, most of the animals are of the same head, that are carriage horses.

Q. But all of this kind?

A. All of this kind.

Q. Are some more desirable than others?

A. Yes sir.

Q. What makes them more desirable?

A. Their breeding, possibilities of winning and what they show there and then.

Q. Now then compare the majority of horses a large majority of horses shown at that sale at that time where would you place the fellows I have named, Lou Blake, Rythmic Bel, Veronique as to their desirability?

138 A. Why their breeding was par excellent, what we call par excellence in the producing line, right on top, by sires and out of mares the best the United States today has got, consequently they would be more desirable than some got by some other stallion that might be equally as good but ain't known, has not produced anything.

CHARLES A. NILES being first duly sworn in answer to interrogatories propounded by Albert Salzenstein, Esq., testified as follows to-wit:

Q. State your name to the jury?

A. Charles A. Niles.

Q. Where do you live?

A. Terre Haute, Indiana.

Q. What is your business?

A. I am what is called a horse merchant.

Q. Define to the jury what that business is?

A. It is buying and selling horses as well as training and developing speed.

Q. What kind of horses mostly do you handle?

A. Invariably trotters and pacers and stock colts.

Q. How long have you been in that business?

A. Well, virtually all my life.

Q. What is your age now?

A. 53 years old.

Q. What experience have you had in shipping that class of horses for long distances?

A. Well, I have made some very long shipments, for instance from Minnesota to Philadelphia and the like of that, Boston and New York.

Q. A thousand miles or more?

A. Oh, yes.

Q. Also shipped to New York?

139 A. Well I never shipped but one horse to New York for a sale but I have shipped there for racing purposes.

Q. You are familiar then with the effect on horses of long shipments?

A. Oh, yes, I think so, yes.

Q. What is the effect on that class of stock in long shipments by freight?

A. Well, in what way do you mean?

A. I mean in length of time?

A. Well, if it is a great length of time I always manage to have then unloaded and rest if it is a possible thing.

Q. What effect has a long continuous trip of four or five days on horses of that sort, four and five days and night?

A. Well, it is very detrimental if they are not in a way to ship as quick and as fast as possible, what I mean by that is any delay by the cars standing still and other trains passing them is very annoying to a car load of horses.

Q. What effect has it on the horses?

A. Well, of course it has different effects on different horses.

Q. This class of stock?

A. It makes them very restless to stand long at any one particular place.

Q. Taking a shipment of fourteen head of horses, of high bred trotting horses, race horses, loaded on the cars at Springfield a little after four o'clock on the afternoon of January 26th 1906, thence taken about one o'clock by train to Joliet where they arrived about six o'clock in the morning and were kept in the yard at Joliet until about three o'clock and taken then to Lake a distance of some forty or fifty miles and taken by train from Lake between twelve and two o'clock, on the morning of the 26th then by degrees to New York, stopping at various places at some of them six and seven hours at a number of places in which this car load was contained, being jostled about by reason of some of the cars needed being iced, the

140 cars being taken forward under the shoot, and reaching New York only on the morning of the 29th of January, what effect would you say such shipments would have on these horses, what effect in your opinion?

A. Well, in the first place I would call it a very bad ship.

Objected to by defendant. Objection sustained by the Court and the answer excluded.

Q. What effect in your opinion would it have on the horses?

A. What effect in what way?

A. Upon their condition, physical condition?

A. Why it would have a very detrimental effect.

Q. In what way?

A. In the way of their being by standing and by the constant jerk of the engine and the air brake, the horses are tied by their head and they get this jerk, it very much sores them in the shoulders on account of their being tied up by the head.

Objection by defendant to making this matter a matter for hypothetical questions and answers thereto, there is evidence as to the actual things that took place from men who were present and as to the actual condition of the horses when they arrived it seems to me it is going too far to put it to an expert as to what was done under hypothetical circumstances.

The COURT: The actual testimony is that these horses that were on this journey something like four or five days and it is proper I think to prove by experts the difference that would be in conditions between a shorter transit and this longer one.

Mr. PATTON: But this witness has testified as to what would be the effect of the long transit.

The COURT: I suppose that is really put in as preliminary to getting the difference between the two, I take it that is the purpose, if it is not for that purpose I would be inclined to agree with your proposition so far as he has gone at least up to this time, that the
141 actual condition of these horses is established by the men who accompanied them, but what would have been their condition if they had been shipped say thirty hours faster is a matter he must determine as far as he can show.

Mr. PATTON: That is not the point of objection.

Mr. SALZENSTEIN: I am leading up to that, and in addition the Court held this morning on a question by Mr. Patton we could not show the actual occurrences by those witnesses on those things.

The COURT: The purpose of proving the difference in condition can only be done by hypothetical question and may be done in that way.

To which ruling of the Court the defendant by its counsel then and there excepted.

Q. What would be the difference in condition of any had those horses been shipped to reach New York on a train which got there at eight o'clock Saturday evening, that is on the evening of the 27th as against the time that I have mentioned in the morning between six and eight of Monday the 29th of January with this class of stock I mentioned in the question, what would be in the condition of the horses in your opinion?

A. Well there would be a great difference.

Q. In what way?

A. In this way, if I may be allowed to explain, that is the car is moved and the horses are jerked continually we will say two or three times a day at different places, they naturally will warm up, when they get to running there ain't no car you can get that will keep the draught from these horses, but what they will take cold.

otherwise if they had been going along necessarily they don't get warm by shipping therefore there is no danger or not much danger of their taking cold and having what we call pneumonia at the end.

Q. How about that sore feeling you have spoken of, tired sore feeling?

A. That we seldom see if a car is in transit most of the time and isn't jostled around.

Q. How long does it take to put horses in good condition
142 that have been subjected to this treatment and being on the road the length of time I mentioned in the first question, that is from about 4 P. M. on the 25th until six or eight P. M. on the morning of the 29th?

Objected to by defendant as immaterial how long it takes to put horses in good condition?

A. I will add to it then to cover any objection, so that they may be shown and exhibited at a public sale where they are required to move and be in a reasonably fit condition for that purpose?

Objected to by defendant as immaterial and no notice shown or alleged to this defendant railroad company of any necessity of putting horses in condition.

The COURT: My notion is the wiser way to proceed is to proceed on the proposition that the sale was at a certain time, that the horses got there at a certain time, you could do what you did do with them in the meantime, and put them on the market in such condition as they were, and the difference in value: I have allowed you to show between the condition they were when put upon sale and in which they arrived as proper to go to the jury, if you go into the question of how long it would take to put them into condition for this particular sale then you get into that very difficulty we first run into if they should miss this sale, the question would be whether the damages was missing this sale, and all that. The objection is sustained.

Q. Mr. Niles, were you present at the sale of these horses at Madison Square Garden?

A. This particular sale?

A. Yes?

A. Yes sir.

Q. If you had previous to that time a familiarity with the market price there or elsewhere of this class of horses?

A. Yes sir I have attended those sales.

Q. How long have you been attending those sales?

A. O, I could not hardly say, I expect eight or ten years.

143 Q. Do you remember any of these horses by name in Mr. Kirby's shipment?

A. Yes, I remember a few of them, yes.

Q. Take the mare named Lou Blake, do you remember her?

A. Yes, I remember her, drove her, it is a filly.

Q. What in your opinion at that time and place was her fair market value had she been in a reasonably good condition?

A. Well, there is a good many ways that I could answer that.

The COURT: Just answer in dollars and cents.

Q. What was her fair market value at that time and place if she had been in reasonably fair condition?

A. I would say three thousand dollars.

Q. What was her condition?

A. She was in very bad shape.

Q. Tell in what way?

A. Can I tell when I first saw her?

Q. Tell all you want to, when you first saw her if you did see her before that time anywhere?

A. I saw her about 11 o'clock the night before the day she was going to sell, she was then very uneasy and restless and I thought quite a sick filly, so much so that she labored in breathing and was as I say very uneasy, walking around her stall and seemed to be in quite a bit of distress, in a smothering way, like she was troubled with some lung trouble.

Q. What was her condition on the next day?

A. The next day I saw her about half past nine I think, and her condition was as far I could see about the same.

Q. And at the time she was sold what was her condition?

A. At the time she was sold I could not see any improvement.

Q. Do you remember the horse called Rythmic Bel?

A. Yes sir.

Q. Do you know in what condition he was at that sale?

A. Well, his condition was similar to the others, to this filly Lou Blake, only I don't think he was quite so bad, wasn't quite so sick.

144 Q. Had he been in reasonably good condition what was his fair market value at that time and place?

A. I would say thirty five hundred dollars.

Q. Are you familiar with Cornelia Bel, mare called Cornelia Bel?

A. Yes, I have raced with her a number of times.

Q. What was her condition at that sale?

A. Well, I didn't pay so much attention to her because I wasn't in a measure interested in her like I was the filly and the colt, she wasn't sick, but with a kind of stock, so I didn't pay very much attention to her.

Q. So you don't know exactly what her condition was?

A. I took notice of her in a friendly way because I always admired the mare, I took notice she was sick and seemed to be worn out.

Q. Now had she been in reasonably fair condition at that sale what would you say was her fair market value at that time and place?

A. Well, the way other mares sold that had records there I should say that she was worth three thousand dollars.

Q. That was her fair market value?

A. That would be her fair market value I would think.

Q. Now do you remember a mare by the name of Veronique?

A. I don't remember so much about that mare, no sir, only in a casual way that is all.

Q. Do you know what condition she was in?

A. She was in about the same condition of the others so far as I could see.

Q. Now had this mare been in a reasonably fair condition what was her fair market value at that time and place?

A. I am not familiar enough with that mare to give an intelligent answer to that question, because I wasn't well enough posted on the mare to pass my opinion in a reasonable way.

145 Q. Now were there any other animals in that consignment that you were familiar enough with, are familiar enough with to tell us what they would have brought if in a reasonably fit condition at that time and place?

A. No sir, I don't think I was familiar enough with the balance of that lot to give an intelligent answer to those questions.

Q. You said something about paying particular attention to several of these horses, was there any reason for so doing?

A. Yes sir.

Q. What was that reason?

A. I selected the ones, well, Lou Blake in particular for one I saw her trot a race and win out here myself and in fact I raced a horse that afternoon myself, but not in her class.

Q. Here at Springfield.

A. Here at Springfield, yes sir, as a two year old.

Q. Any other horse?

A. Well, not that I would trot a race, no colt, except the old mare Cornelia Bel.

Q. Did you have in mind or contemplate making a purchase of any of these animals yourself at that time?

A. Yes sir.

Q. What was it?

A. Lou Blake and Rythmic Bel.

Objection by defendant to the testimony as to the contemplation of purchase by this gentleman, being no special circumstances averred that there was any special purchaser of any special animal.

The COURT: I am inclined to think the testimony may stand for the purpose of showing his attention was directed specially to these two, of course he has not stated and would not be allowed to state what he expected to give for them.

146 To which ruling of the court the defendant by its counsel then and there excepted.

Mr. PATTON: Neither is it proper to show at a particular sale a particular purchaser was there desiring to buy, for that has no effect on the market value.

The COURT: I have not allowed it to go for that purpose, the only purpose for which it is admitted is tending to show why he paid attention to their condition, but not as an estimate of their market value.

Mr. SALZENSTEIN: Here are some depositions taken upon due notice under a commission issued by this court.

Mr. PATTON: I might say in regard to those depositions we have

a right to object to any and all questions, that was agreed to in taking the testimony.

Mr. SALZENSTEIN: Objections were interposed throughout the taking of this testimony.

Mr. PATTON: Some were and some not at the caption of the deposition defendant reserved the right to object to the testimony on the trial to the testimony taken under this deposition, in the caption of the deposition.

Mr. SALZENSTEIN: The caption shows the deposition of this witness, and after that the statement, "It is understood that the defendant reserves its right to object upon the trial to the testimony taken under this commission." The deposition is as follows:

H. M. FULLER, being duly sworn testified as follows:

Direct examination:

Q. What is your name, age and residence?

A. My name is Hiram M. Fuller. Sixty years of age. 157 W. 119th street. My business is manager of the export department of the Fiss, Doerr & Carroll Horse Co.

Q. How long have you been engaged in that business?

A. Six years.

Q. Do you know Nathaniel T. Kirby, the plaintiff in this action?

147 A. Yes sir. I have known him for the past two years.

Q. What do you know of the shipment of a car load of horses by Mr. Kirby consigned to Fasig-Tipton Company, New York, the latter part of January 1906?

A. I know that such a car arrived at out platform at 12.30 P. M. the 29th day of January 1906.

Q. What did you have to do with this shipment?

A. I have acted as agent for the New York Central Railroad receiving horses and delivering horses.

Q. I hand you a paper purporting to be the bill of lading and ask you if you know who put the memorandum on it in red ink?

A. Yes sir I did.

Q. That is, you made the memorandum on both the front and reverse side.

A. Yes sir. I made the red ink on both the front and reverse side.

Q. Will you explain under what circumstances you made these two memoranda?

A. At the request of Mr. Kirby.

Q. The car number described in this memorandum is correct?

A. Quite correct, yes sir.

Q. And the time of arrival was correct and the number of horses therein referred to was correct?

A. Yes.

Bill of lading marked Plaintiff's Exhibit "A." for identification.

Mr. PATTON: We object to this bill of lading as being wholly im-

material and incompetent, issued by the Michigan Central Railroad Company, and not by the Chicago & Alton and the defendant has no knowledge of it.

Mr. SALZENSTEIN: We just offer it to show the time of arrival and the number of horses and whose they were.

Mr. PATTON: If for any other purpose but for the time of arrival we object.

148 Said bill of lading so offered in evidence being in the words and figures to-wit:

PLAINTIFF'S EXHIBIT "A," FOR IDENTIFICATION. A. W.

New Form 386 10m o p co.

Michigan Central Railroad Co.

Uniform Live Stock Contract.

JOLIET STATION, Jan. 25, 1. '06.

This agreement, made this 25th day of Jan. 1 '06 by and between the Michigan Central Railroad Co. hereinafter called the carrier, and N. T. Kirby, hereinafter called the shipper:

Witnesseth: That said shipper has delivered to the said carrier Live Stock of the kind and number, and consigned and destined by said shipper as follows:

Consignee.	Destination, etc.	Number and description of stock, shipper's load and count.	Weight subject to correction.
Fasig-Tipton Co.	14 Horses.	20000
130 St. Sta. New York, N. Y.			
Advance Charges, \$—.			
Car. Nos. and Initials—6082 A P H Co.			

for transportation from Joliet Ill. to destination on the said carrier's line of railroad, otherwise to the place where said Live Stock is to be received by the connection carriers for transportation to or toward destination, and that the same has been received by said carrier for itself and on behalf of connecting carriers, for transportation subject to the official tariffs, classifications and rules of the said company, and upon the following terms and conditions which are admitted and accepted by the said shipper as just and reasonable, viz:

That said shipper, or the consignee, is to pay freight thereon to the said carrier at the rate of per tariff * * * which is
149 the lower published tariff rate based upon the express condition that the carrier assumes liability on the said live stock to the extent only of the following agreed valuation upon which valuation is based the rate charged for the transportation of the said animals, and beyond which valuation neither the said carrier nor any connecting carrier shall be liable in any event whether the loss

or damage occur through the negligence of the said carrier or connecting carriers or their employés or otherwise.

If Horses or Mules—not exceeding One Hundred Dollars each.

If cattle or cows—not exceeding seventy-five dollars each

If fat hogs or fat calves—not exceeding fifteen dollars each.

If sheep, lambs, stock hogs, stock calves or other small animals, not exceeding five dollars each.

And in no event shall the carrier's liability exceed \$1,200 upon any car load.

That said shipper is to pay all back charges and freight paid by said carrier or connecting carrier upon or for the transportation of said live stock.

That the said shipper is at his own sole risk and expense to load and take care of, and to feed and water said stock whilst being transported, whether delayed in transit or otherwise, and to unload the same, and neither said carrier nor any connecting carrier, is to be under any liability or duty with reference thereto, except in the actual transportation of the same.

That the said shipper is to inspect the body of the car or cars in which said stock is to be transported, and satisfy himself that they are sufficient and safe, and in proper order and condition,

150 and said carrier or any connecting carrier shall not be liable, on account of any loss of or injury to said stock happening by reason of any alleged insufficiency in or defective condition of the body of said car or cars.

That said shipper shall see that all doors and openings in said car or cars are at all times so closed and fastened as to prevent the escape therefrom of any of the said stock, and said carrier or any connecting carrier shall not be liable on account of the escape of any of the said stock from said car or cars.

The said carrier or any connecting carrier shall not be liable for or on account of any injury sustained by said live stock occasioned by any or either of the following causes, to-wit: Overloading crowding one upon another, kicking or goring, suffocating, fright, burning of hay or straw or other material used for feeding or bedding, or by fire from any cause whatever, or by heat, cold, or by changes in weather, or for delay caused by stress of water, by obstruction of track, by riots, strikes or stoppage of labor, or from causes beyond their control.

Shipments of horses must in all cases be accompanied by an attendant to destination.

That in the event of any unusual delay or detention of said live stock, caused by the negligence of the said carrier, of its employés, or otherwise the said shipper agrees to accept as full compensation for all loss or damage sustained thereby the amount actually expended by said shipper, in the purchase of food and water for the said stock, while so detained. That no claim for damages which may accrue to the said shipper under this contract shall be allowed or paid by the said carrier, or sued for in any court by the said shipper, unless a claim for such loss or damage shall be made in writing, verified by the affidavit of the said shipper or his agent, and delivered to the

M. C. R. R. Agent of the said carrier at his office in Joliet, within five days from the time said stock is removed from said car or cars; and that if any loss or damage occurs upon the line of a connecting carrier shall not be liable unless a claim shall be made in like manner, and delivered in like time, to some proper officer or agent of the carrier on whose line the loss or injury occurs.

That *whatever* the person or persons accompanying said stock under this contract, to take care of the same, shall leave the caboose and pass over or along the cars or track of said carrier or of connecting carriers, they shall do so at their own sole risk of personal injury, from whatever cause, and neither the said carrier, nor its connecting carriers, shall be required to stop or start their train or caboose cars at or from the depots or platforms, or to furnish lights for the accommodation or safety of the persons accompanying said stock to take care of the same under this contract.

And it is further agreed by said shipper that in consideration of the premises and of the carriage of a person or persons in charge of said stock upon a freight train of said carrier or its connecting carriers without charge other than the sum paid for the transportation of the live stock in charge of which he is, that the said shipper shall and will indemnify and save harmless said carrier and every connecting carrier, from all claims, liabilities, and demands of every kind, nature and description, by reason of personal injury sustained by said person or persons so in charge of said stock, whether the same be caused by the negligence of said carrier or any connecting carrier, or any of its or their employés or otherwise.

And N. T. Kirby do hereby acknowledge that he had the option of shipping the above described Live Stock at a higher rate of freight according to the official tariffs, classifications and rules of the said carrier and connecting carriers and thereby receiving the security of the liability of the said carrier and connecting railroad transportation companies and common carriers of the said Live Stock upon their respective roads and lines, but has voluntarily decided to ship same under this contract at the reduced rate of freight above first mentioned.

152

THE MICH. CENT. RY. COMPANY.
By W. D. MOHR, *Station Agent*.

Witness my hand,

N. T. KIRBY, *Shipper*,

By ———, *Shipper Agent*.

W. D. MOHR, *Witness*.

Release for Man or Men in Charge.

In consideration of the carriage of the undersigned upon a freight train of the carrier or carriers named in the within contract without charge, other than the sum paid on to be paid for the carriage upon said freight train of the live stock mentioned in said contract, of

which live stock man is in charge, the undersigned does hereby voluntarily assume all risk of accident or damage to his person or property and does hereby release and discharge the said carrier or carriers from every and all claims, liabilities and demands of every kind, nature and description for — on account of any personal injury or damage of any kind sustained by the undersigned so in charge of said stock, whether the same be caused by the negligence of the said carrier or carriers or any of its or their employes or otherwise.

N. T. KIRBY,

Signature of Man in Charge.

W. H. MOHR, *Witness.*

(At the close of the above in red ink the following words and figures)

14 Horses arrived in car #6082 APH Co. 12.30 P. M. and delivered to Mr. Kirby. One horse sick.

H. M. FULLER.

(Across the face of the above written in red ink appears the following)

Car 6082 A. P. H. Co. 14 horses arrived at platform 12.30 P. M. Monday January 29, 1906 and delivered to Mr. N. T. Kirby
H. M. FULLER, *Act. Agent.*

Q. Mr. Fuller, will you state what the condition of those horses was at that time?

A. I did not notice anything out of the ordinary except
153 that one horse was sick and that we called a veterinary for the sick horse.

Q. Do you remember what veterinary it was?

A. I think it was Doctor McCully.

Q. You've had a great deal of experience in shipping horses the last six years have you not?

A. I have yes sir.

Q. Can you state what was the cause of the sickness of that one horse?

A. No sir.

Q. What kind of horses were these?

A. Well, I don't know particularly. They were trotting horses
I suppose.

Q. They were not draft horses were they?

A. No.

Q. In your knowledge of horses would you state whether or not they were highly bred horses?

A. No sir. I would not say so. I don't know.

Q. Do you know what the freight charges on this shipment were?

Mr. PATTON: I object to the testimony as to the amount of freight charges as incompetent immaterial and irrelevant.

The COURT: I think I understand the situation, if I do the objection, for the time being at least is overruled, they claim a special contract with you to deliver their car in time to take this Michigan Horse car, they say you didn't do it and therefore- they had to negotiate the best they could, and in that way it costs them more.

Mr. PATTON: I make the objection on the basis of the former objection, that the basis of this contract is invalid and void.

The COURT: Yes, I understand all that.

To which ruling of the court the defendant by its counsel then and there excepted.

A. Yes sir. I know just exactly what was paid in the first instance.

Q. What was paid in the first instance?

A. \$200.50.

Q. Who paid that?

A. Mr. Tipton paid that to me.

154 Q. State what you know regarding the payment of this freight?

A. I rendered the bill to Fasig-Tipton for \$200.50 for which I received payment. This car of horses was originally billed at 130th street. The car was rebilled from 130th street to my stable at 36th street. The charges for bringing that car down was \$16. That was deducted by instructions from Mr. Adams from Mr. Dutcher's office \$16 was taken off leaving a total amount of \$200.50. On June 8, 1906, I mailed a check to Mr. Kirby for \$10 as a refund of overcharges on freight charges.

Q. Who finally paid this bill?

A. Who paid the bill? the Fasig-Tipton Company.

Q. That is so far — you know?

A. Yes sir.

Q. Mr. Fuller, you testified that you shipped a great many horses across the water?

A. Yes sir.

By Mr. CARTER:

Q. In answer to Mr. Tanner's question in regard to shipping horses you stated that you had shipped horses across the water, have you shipped any horses by rail?

A. Across the water?

A. No, by rail?

A. Yes at times. Our office is the receiving office for N. Y. Central road.

HIRAM M. FULLER.

EDWARD A. TIPTON, being duly sworn, testified as follows:

Direct examination by Mr. TANNER:

Q. State your name, age, residence and occupation?

A. My name is Edward A. Tipton, I am 50 years old; reside at 231 West 97th street, New York City and am President of the Fasig-Tipton Company, horse auctioneers.

155 Q. How long have you been with the Fasig-Tipton Company?

A. Ever since it, the Company, was organized.

Q. How long ago was that?

A. That was about eight years ago.

Q. In what capacity have you been connected with that Company?

A. I was originally the secretary and treasurer and since then I have been the president.

Q. Explain generally the nature and extent of the business of the Fasig-Tipton Company?

A. We are auction brokers of live stock, specially horses and do business in New York, Boston, Cleveland, Ohio, Lexington, Ky., also Saratoga, N. Y., although we have no office there.

Q. What experience and knowledge have you had of the shipment of high bred stock, more particularly blooded stock?

A. We have handled—I have been in the business of handling high bred, thorough breds and trotters for a great many years, certainly 20 to 30 years.

Q. Have you had occasion frequently to ship such stock as thorough breds by rail?

A. I have had occasion to have them shipped. I never have been along with them, have had them shipped, thousands of them.

Q. Have you had occasion to observe the effect of long transportation on stock of this kind?

A. I don't know that I have in a way, because I have been at the head of the concern and have not been in the stables. I know the general effect.

Q. You know the general effect in the course of your 20 or 30 years' experience, you have had the occasion to observe the effect of a long travel by rail?

A. Yes sir I have.

Q. What is the effect of such transportation?

Objected to by defendant as immaterial, irrelevant and incompetent.

The COURT: For the purpose of comparing the condition of these horses at the time they would have arrived by a shorter shipment and a longer shipment I think it is competent, for any other purpose it is incompetent, nor is there anything in there—

156 Mr. SALZENSTEIN: He says the great trouble I have found in shipping horses if this, is the laying them up on the road any length of time.

Mr. PATTON: The very thing we are objecting to and as we objected to it before.

The COURT: I am of opinion a portion is competent, that which is incompetent it seems to me to be harmless, it is very hard to separate it, for instance long transportation is much harder on them than a short one, that is competent, and it tires them very much more than it does to come right through. I am of opinion

that is competent, there is mixed up with it a lot of stuff about horses and men, it don't seive them all alike, that probably is harmless, I am rather disposed to overrule the objection and let it be read.

To which ruling of the Court the defendant by its counsel then and there excepted.

Mr. PATTON: Let it be understood that all questions and answers are objected to down to the question "Did you have any correspondence or dealing with Mr. Kirby regarding the consignment of a car load of horses to your firm for the Madison Square Garden sale in New York commencing Monday January 29th, 1906" On the same ground I have made the objection so far as to the expert evidence on the effect of transportation.

Objection overruled by the Court: To which ruling of the Court the defendant by its counsel then and there excepted.

A. Well, it is different on different horses, just like it is on men. Now some horses ship badly and others it doesn't seem to affect at all. Of course a long transportation is much harder than a short time.

157 Q. I am referring now to blooded horses, high bred horses?

A. The great trouble I have found in shipping horses is this, is the laying them up on the road any length of time.

Q. What effect does that have?

A. It tires them very much more than it does to come right through.

Q. The effect on high bred horses is much more marked than on common horses, is it not?

A. I never handle any common horses, never shipped any, always deal in high bred market, was raised in it.

Counsel for defendant stated that it is understood that all these questions are subject to the same objections.

Q. Is it not true that shippers of high bred horses make a great point of having the shipment as short as possible?

A. Yes sir.

Q. Isn't this especially true if they are to be sold at the end of the shipment?

A. Yes sir.

Q. And the longer they are on the road; the worse it is for them?

A. The worse it is for them, they get very tired and don't show the advantage.

Q. Are you acquainted with the plaintiff in this action, Mr. Kirby?

A. Yes sir.

Q. How long have you known him?

A. I have known Mr. Kirby 12 to 15 years.

Q. Did you have any correspondence or dealing with Mr. Kirby regarding the consignment of a car load of horses to your firm for

the Madison Square Garden sale in New York commencing Monday 29th, 1906?

A. That correspondence was conducted by Mr. Tranter, who is here with me the manager of our trotting department.

158 Q. That correspondence eventually passed through your hands?

A. No sir, it did not pass through my hands, it was a very heavy correspondence.

Q. Have you ever seen that correspondence?

A. I couldn't swear that I had, I have seen part of it since the sale, not before. I have had correspondence since the sale with Mr. Kirby, but I wouldn't say I had seen it before that.

Q. Have you heard the previous witness, Mr. Fuller, testify?

A. Yes sir.

Q. Do you know anything about the shipment of horses referred to by him?

A. I know about the horses about the consignment.

Q. That is the same consignment?

A. Yes sir.

Q. There was only one consignment from Mr. Kirby during January 1906?

A. That is all. One consignment of one car load.

Q. State generally what you did regarding this consignment Mr. Tipton?

A. Well, the consignment of horses came into our place, to the best of my recollection, late Tuesday afternoon, to be sold Wednesday afternoon.

Objection by defendant to that portion of the answer "to be sold Wednesday afternoon" there being no allegation in the declaration or proof that there was notice given to this carrier that the horses were to be sold on any particular day, which is an element of special damage and must be averred and proven. Objection overruled by the Court. To which ruling of the Court the defendant then and there excepted.

Q. Do you remember what dates these were?

A. Yes, they were to be sold January 31, and were received by us on the afternoon of Tuesday, January 30th.

Q. How many horses were there in that consignment?

A. I don't remember, Mr. Tranter has charge of that.

159 Q. What time in the afternoon of the 30th did you receive these horses?

A. To the best of my recollection between four and five o'clock.

Q. What time did the sale start?

A. I am speaking altogether from memory, I think the sale began about two o'clock in the afternoon.

Q. State as fully as you can what the condition of these horses was?

Counsel for defendant states that formal objection is made to that on the ground that it is immaterial, irrelevant and incompetent and that witness is not qualified to speak. Objection renewed by

defendant. Objection overruled by the Court. To which ruling of the Court the defendant by its counsel then and there excepted.

A. There were several of them, several not in salcable condition, like Kirby always sends his horses. I saw those horses.

Counsel for defendant objects and moves to strike out the words "like Mr. Kirby alway sends" Motion to strike out sustained by the Court and the words objected to stricken.

A. Then there was one mare that was shipped that was quite sick and she was sold as a sick horse, without warranty of any kind.

Q. If a horse is not in salcable condition, do you usually sell without a warranty?

Objected to by defendant as immaterial, irrelevant and incompetent.

Objection sustained by the Court.

Q. What did you mean when you said without warranty of any kind?

Objection by defendant to what they usually do. Objection sustained by the Court, the Court remarking because it is testified to here this mare was sold without warranty.

160 A. Yes, subject to veterinary inspection.

Same objection to all questions.

Q. Not referring to this one sick horse but to the others you mentioned as being in an unsalcable condition, how many were there exclusive of the one horse just mentioned?

A. I couldn't say positively, there must have been three or four more, I couldn't say positively.

Q. Can you state from your experience what was the matter with the one horse which you mentioned being sick?

A. No sir, I am not a veterinary, I don't know.

Q. From your experience could you say whether a shipment of four days and five nights by rail would produce the condition you observed in that horse?

Objected to as immaterial, irrelevant and incompetent. Witness not qualified to answer.

The COURT: Gentlemen of the jury, the court is of the opinion the answer ought not to be read because this man is not a veterinary surgeon or knows anything about the diseases of horses and things of that kind. The objection is sustained on the ground the man has not shown himself competent to answer.

Q. What effect, if any, would a delay of 24 hours or more have on those horses in reaching New York by rail for the Madison Square Garden sale, what effect would it have on the market price of them?

Objected to by defendant as immaterial, irrelevant and incompetent.

Witness not qualified to speak, purely speculative nature, no evidence as to the condition the horses were shipped in.

Mr. PATTON: We insist upon that objection.

The COURT: It depends upon what he says later whether is he competent to answer or not. Well I am inclined to think the answer discloses nothing of any value. The objection is sustained.

161 Q. Will you please explain fully how horses are entered, handled and sold at the Madison Square Garden sales explaining the numbering of each horse, description in the catalogue and anything else therein contained regarding the conduct of the sale?

Objected to as immaterial, irrelevant and incompetent.

The COURT: The objection is overruled, I am allowing this testimony to go in to show the character of the sale, as tending to throw what light it will as to whether they brought market value and all that. To which ruling of the Court the defendant by its counsel then and there excepted.

A. Every horse is entered in writing with his pedigree, his description, his performances given, with the pedigree and all facts and we have them printed and numbered in the catalogue, just like all catalogues. The horses are brought before the stand and exhibited to the public, showing their condition and if they are harness horses, their way of going, manner &c. and they are then put up for auction and then sold, shown to the public and then sold.

Q. How long before the day advertised for the sale of the horses are they shown to the public?

Objected to by defendant.

The COURT: The objection is sustained, I am of opinion from the point where you stopped down to where he begins to speak about this \$29.00 of freight, I am of opinion it ought to be excluded, previous sales made for Mr. Kirby and correspondence with Mr. Kirby and all that ought to be excluded, from the point objection is made, all that I think as I understand this case ought not to go in.

Q. What do you know about freight charges on the car in which these horses were? I am referring now to the last consignment of January 1906?

162 A. I know that Mr. Fuller representing the New York Central Railroad collected from us \$200.50 and that the same was charged to Mr. Kirby.

Q. Have you the bills is this last case?

A. The bills of lading?

Q. The bills for the freight?

A. No, they were sent back to Mr. Kirby. Always are, I suppose they were.

Cross-examination by Mr. CLEMENT:

Mr. PATTON: There is some cross examination here in regard to matter that has been excluded.

The COURT: You can leave that out if you want to, if you read

the cross examination as to the excluded matter we will have to read the excluded matter; I will give you leave to withdraw so much of the cross examination as pertains to any part that has been excluded.

Q. Did you see those horses at any time before they were received in New York?

A. I did not. I never saw them until they came into our place.

Q. Who delivered them in your place?

A. I have forgotten, from memory would say we sent for them ourselves.

Q. To what place did you send for them?

A. Fiss, Doerr & Carroll Horse Co., export stables, agents for the New York Central.

Q. Do you know what time Fiss, Doerr & Carroll received these horses?

A. I do not.

Mr. PATTON: Now here is the redirect examination.

The COURT: I am of opinion that ought to be excluded, all of the redirect.

163 Mr. PATTON: And the re-cross examination is withdrawn.

Mr. SALZENSTEIN: I suppose we want it in.

Mr. PATTON: I don't care about it, if you want to read it go ahead subject to such objection as we may make.

Mr. SALZENSTEIN: We want the following:—

Q. These horses were received by you on Tuesday?

A. Yes, Tuesday afternoon, late.

Q. For this sale in Madison Square Garden?

A. Yes sir.

Q. The sale running Monday, Tuesday, Wednesday and Thursday?

A. Yes sir.

Redirect examination.

Q. The horses shipped by Mr. Kirby were to be sold on Wednesday?

Objected to by defendant as wholly immaterial and incompetent.

Mr. SALZENSTEIN: This relates entirely to when these horses were to have sold, sold that day, whether or not they could have been sold any other day.

Mr. PATTON: That is the very thing we object to on it seems to me a very plain ground.

The COURT: I am inclined to think as part of your case in chief it is not material.

Mr. SALZENSTEIN: That covers the balance of his testimony. The next is the deposition of.

E. J. TRANTER a witness called on behalf of the plaintiff, being duly sworn, testified as follows:—

Direct examination by Mr. TANNER:

Q. What is your business?

A. I am manager of the trotting department of the Fasig-Tipton Company.

Q. How long have you been such manager?

A. Two years.

Q. Do you know anything about the shipment of 14 horses from Mr. Kirby to your company the latter part of January, 1906?

164 A. I know that such shipment was made.

Q. Did you handle the horses?

A. No sir.

Q. Who did?

A. What do you mean by "handling them"?

(Question withdrawn.)

Q. Did you have anything to do with those horses?

A. My end of the work is purely clerical. I solicit and receive the consignments. I advertise them and endeavor to attract customers for them.

Q. Did you advertise this particular lot of horses?

Objected to by defendant. Objection sustained by the Court.

Q. Was that lot advertised for the Wednesday's sale referred to by Mr. Tipton?

Objected to by defendant. Objection sustained by the Court.

Q. Did you see any of those horses yourself?

A. I did.

Q. Mr. Tipton has referred to one mare in this lot of 14 horses shipped by Mr. Kirby as being sick, what do you know regarding her condition on the arrival of the lot at the Garden and as to her sale, and to whom she was sold?

Objected to by defendant as immaterial, irrelevant and incompetent. Objection overruled by the Court; To which ruling of the Court the defendant by its counsel then and there excepted.

A. I know nothing about the mare's condition when she arrived in the Garden, because she arrived on Tuesday, but when she was sold Wednesday afternoon the mare was sick, very sick and was sold as a sick mare. The purchaser immediately after he bought her asked me to call for a veterinary to come down and take care of the mare and on the advice of the veterinary who came the mare was taken out of the Garden immediately.

165 Objection by defendant to what the purchaser did. Objection sustained by the Court.

Q. Was she sold without a warranty?

A. She was sold as she stands, which means without warranty.

Objected to by defendant. Objection overruled by the Court. To which ruling of the Court the defendant then and there excepted.

Q. Who was the veterinary?

The COURT: Leave that out.

Q. Who was the person to whom the mare was sold?

A. Walter M. Jermyn.

Q. What did you notice at the time regarding the condition of the horses in this shipment?

Objected to by defendant as immaterial irrelevant and incompetent. Objection overruled by the Court to which ruling of the Court the defendant by its counsel then and there excepted.

A. I paid very little attention to it.

Q. Did you notice anything particular regarding them?

A. No sir.

Q. Do you know what the name of this mare was?

A. Lou Blake.

Cross-examination by Mr. CLEMENT:

Q. You stated that you didn't have anything to do on behalf of the Company in handling the horses?

A. Yes sir.

Q. At the time they arrived at Fasig-Tipton Co.'s?

A. No sir.

Q. You stated something about one sick horse, was this one of the horses consigned in this consignment from Mr. Kirby?

A. This horse was shipped in the car with Kirby's consignment and shipped in Mr. Kirby's name.

Mr. PATTON: The balance of this is in regard to the matter that is excluded and we withdraw the cross examination.

The COURT: Let it be withdrawn.

Mr. SALZENSTEIN: Here is part of your cross examination we want in:

166 Q. All you had to do was the clerical work?

A. Largely, yes sir.

Q. Nothing to do with the actual handling?

A. No sir.

Mr. PATTON: Yes, we don't care whether it goes in or not.

Redirect examination by Mr. TANNER:

Q. You are present at the sales carried on which you advertise?

A. Yes sir always.

JOHN J. ADAMS, a witness called on behalf of plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. TANNER:

Q. What is your residence?

A. 559 Walton avenue, New York.

Q. What is your age?

A. 34.

Q. What is your occupation?

A. Chief Clerk of the Live Stock Department of the New York Central.

Q. How long have you been with that Company?

A. 20 years.

Q. How long have you been in the position of Chief Clerk?

A. 10 years.

Q. Are you acquainted with the schedule time of the fast freight train known as the Horse Special Train going from Chicago, Ill. to New York City over the Michigan Central and New York Central Railroads?

A. There is not now any train known as the Horse Special Train from Chicago to New York.

Q. What train has taken its place, if any?

A. We have a connection from Buffalo which carries the horses from Chicago and makes connection at Buffalo with this Michigan Central fast horse train.

Q. That does the same work?

167 A. Just the same.

Q. As the Horse Special?

A. It is a similar train, that carries high class freight and perishable freight handles horses, dressed meat or anything that requires despatch.

Q. Are high bred horses customarily sent over this line?

A. Right along, regular traffic.

Q. Were you acquainted with the schedule of this train you have just described during January 1906?

A. I was.

Q. Will you state what the schedule of time was and the connection from Chicago to New York over the lines mentioned?

Objected to as immaterial, irrelevant and incompetent, and further witness not qualified to speak and our position is we have no relation whatever to or obligation concerning this fast horse train. Objection overruled by the Court. To which ruling of the Court the defendant by its counsel then and there excepted.

A. The horse train on the Michigan Central from Chicago on this date you speak of, January 25, 1906 that train left at 4 P. M. Chicago it was delivered to us at East Buffalo stock yards at 4 20 P. M. January 26. At that point they unload the horses, put them into the stock yards, feed and water them, rehay the cars and reload them. All that service was performed to train at the stock yards and it left at 6 20 P. M. January 26 the following day.

Q. When did that train get into New York?

A. 8 20 P. M. January 27th, 26 hours, 140 miles.

Q. That is the only fast freight train for the transportation of stock?

A. No, we have another one that leaves in the morning at ten o'clock.

Q. Is this train that you have described first, known by the Michigan Central people as their "horse special"?

A. Their train that they run called the "horse special" makes connection with our New York Central train but is not known—

168 Q. It is known on their road as the "Horse Special"?

A. Yes, although it is known by a different name on our road, we have a different schedule.

Q. But it is known by the Michigan Central people as the "Horse Special"?

A. Yes.

Counsel for defendant moves to strike out answer. Question objected to as immaterial, irrelevant and incompetent. Motion to strike out overruled and objection overruled by the Court. To which ruling of the Court the defendant by its counsel then and there excepted.

Cross-examination by Mr. CLEMENT:

Q. You are in the employ of the New York Central Road?

A. I am.

Q. You are not in the employ of the Michigan Central Road?

A. No.

Q. The statement you have made as to the schedule of this "Horse Special" train, so far as it relates to the Michigan Central schedule from what do you derive it?

A. From the table of freight trains.

Q. From no other source?

A. From the business that we handle that I know about.

Q. How do you know about it, from what people have told you?

A. No, from the reports which I receive twice a week of the arrivals of their horse trains in Buffalo to deliver their freight to us.

Q. All these reports are made by other people?

A. Made by our Agent at East Buffalo.

Q. You have no other information, you have no personal knowledge as to the times of arrival in Buffalo?

A. None whatever.

Q. The same thing is true of all the statements, they are all derived from statements of other people?

A. And our records.

169 Q. All derived from statements of other people to you?

A. Yes.

Redirect examination by Mr. TANNER:

Q. The schedules you have referred to of the Michigan Central Trains were sent to you by the Michigan Central people in the course of your duties as transportation agents of the New York Central Road?

Objected to as immaterial, irrelevant and incompetent. Objection overruled by the Court. To which ruling of the Court the defendant by its counsel then and there excepted.

A. The schedules we have are sent to us for our convenience and for informing our patrons as to their service that we can give them on their shipments of horses and other freights from Chicago to New York.

Q. These schedules are sent by the officials of the Michigan Central Road?

A. Yes, by their transportation department to us.

Q. You speak of the information as to the times of arrival of freight trains over the Michigan Central to Buffalo as being given to you from the regular reports, what did you mean?

A. Given to us by our agent at East Buffalo.

Q. And he sends these reports to you?

A. He gives us the report of the horse train for the forwarding out of the horses from Buffalo which may arrive on their trains, stating what train it may arrive on and what time it moves out on our line, then it is up to us to see whether it is on schedule.

Recross-examination by Mr. CLEMENT:

Q. It is true, is it not, that all the statements you have made are based on statements to you by other persons?

Objected to as having been already testified. Objection overruled by the Court.

A. Yes.

170 Counsel for defendant states: I move to strike out all of the witness's testimony on this schedule time. Motion overruled by the Court, the Court remarking that this testimony tends to show the due course of business between this railroad company and the employé, and that due course of business under such circumstances is competent evidence tending to prove a possible state of facts within the field of the business.

Mr. PATTON: But the objection we make is not based on that ground, the objection we now make is based on the ground that in so far as the propositions in this case are concerned, the horse train of the Michigan Central is something with which we have nothing to do, outside of any interest we have in the case inasmuch as the alleged contract to carry by that train is ultra vires of the gentleman who made it, and ultra vires of the corporation because it is forbidden by the law.

The COURT: For the time being the objection is overruled. To which ruling of the Court the defendant by its counsel then and there excepted.

Redirect examination:

Q. The information which you have testified to is official information received in the regular course of your business as chief clerk of the Live Stock department of the New York Central road is it not?

Objected to as immaterial, irrelevant and incompetent and especially to the word "official."

A. It is absolutely official and correct.

Mr. PATTON: Well, I have made the motion that I want in already and there is no use repeating it.

ROBERT W. McCULLY, a witness on behalf of plaintiff, being duly sworn, testified as follows:

171 Direct examination by Mr. TANNER:

Q. Dr. McCully, what is your age and residence?

A. I reside at 146 East 22nd street, New York. I am 36 years of age.

Q. What is your occupation?

A. I am a veterinary doctor.

Q. How long have you been in that business?

A. 16 years.

Q. Where did you receive your education, Dr. McCully, and your training as a veterinary?

A. At Ontario Veterinary College, Toronto.

Q. When did you graduate?

A. 1890.

Q. Have you been practicing as a veterinary ever since?

A. Yes.

Q. Do you know N. T. Kirby, the plaintiff in this action?

A. Yes sir.

Q. How long have you known him?

A. Since last January, I met him last January.

Q. Do you remember being called to treat a certain mare in a shipment of horses by Mr. Kirby to the Fasig-Tipton Company the latter part of January, 1906?

A. Yes.

Q. At Fiss, Doer & Carroll's stables?

A. Yes sir.

Q. Who called you there Doctor?

A. Mr. Kirby notified the superintendent and the superintendent of the stable called me, called me for Mr. Kirby.

Q. Who did you find in charge of the mare when you called at the stables?

A. I don't know the man's name.

Q. One of the employes of Fiss, Doer & Carroll?

A. No, one of Mr. Kirby's employes.

Q. You don't remember his name?

A. No sir, I don't know his name.

172 Q. Do you know the name of that mare?

A. I believe it was Lou Blake, he told me it was Lou Blake.

Q. Dr. McCully, will you describe her?

A. She was a chestnut mare, about 15 hands 3 inches high. I am speaking just from general memory. I am not describing her accurately. I didn't know I would be asked.

Q. Describe her more particularly if you can?

A. I couldn't; I cannot.

Q. What was the condition of that mare?

A. The mare when I saw her was sick, her temperature was 105½ pulse 80 and weak. Showed all signs of having had a severe chill and congestion of the lungs.

Q. How long did you have charge of her?

A. I think three days—four days.

Q. You made a through examination of her condition didn't you?

A. Yes sir.

Q. What in your opinion caused it?

Objected to as immaterial, irrelevant and incompetent, witness not qualified to speak. Objection overruled by the Court. To which ruling of the Court the defendant by its counsel then and there excepted.

A. Possibly the exposure. The exposure I should say.

Q. Could that condition be caused by a continued shipment of several days?

Objected to as immaterial, irrelevant and incompetent. Objection overruled by the Court. To which ruling of the Court the defendant by its counsel then and there excepted.

A. Yes sir.

Q. Did I understand you to say that such a condition would be caused by the delay of a shipment of this mare from the 25th of January to the 29th of January if she continued on the road?

Objected to as immaterial, irrelevant and incompetent. Objection overruled by the Court. To which ruling of the court 173 the defendant by its counsel then and there excepted.

A. Yes sir.

Q. That is your best knowledge and belief as a veterinary surgeon?

A. Yes sir.

Q. Do you know anything about her sale at the Madison Square Garden?

A. Only what I heard.

Q. Do you know what her condition was at the time of the sale?

A. Yes sir.

Q. What was it?

A. The mare had a temperature of 103 and was weak, she shouldn't have been moved.

Q. That was a continuation of the same trouble for which you had originally treated her on the first day you saw her?

Objected to as immaterial, irrelevant and incompetent. Objection overruled by the Court. To which ruling of the Court the defendant by its counsel then and there excepted.

A. Yes sir.

Q. And according to your experience as a veterinary you believe

that her condition at the time of the sale was the result of this delay in shipment, that I have mentioned?

Objected to as immaterial, irrelevant and incompetent, and that the witness is not qualified to speak. Objection overruled by the Court. To which ruling of the Court the defendant by its counsel then and there excepted.

A. Yes sir.

Q. What was your bill for your services to this mare Lou Blake before the sale?

Objected to as immaterial, irrelevant and incompetent.

The COURT: There is nothing in the bill of particulars about that is there or the declaration.

Mr. SALZENSTEIN: No.

The COURT: Well the objection is sustained and the veterinary bill will not be considered by you gentlemen of the jury.

Cross-examination.

By Mr. CLEMENT:

Q. What time of the day did you first see this mare?

A. I should think about four or five o'clock.

Q. On what day?

A. On January 29, 1906.

Q. You have testified, if I remember rightly, that this high fever and chills might have been caused by exposure?

A. Yes sir.

Q. It might have been caused by anything else?

A. I don't know what else could have caused it.

Q. It is possible it might have been caused by exposure between 12 o'clock that night and 5 o'clock when you saw her?

A. She was in no place where she could have been exposed.

Q. If she had been in a place where she might have been exposed, it might have been caused by such exposure?

Objected to as immaterial, irrelevant and incompetent. Objection overruled by the Court.

A. Her condition was so that it could not have been possible for it to have been caused by exposure between 12 o'clock and five, she was too far advanced in the disease.

Q. Was it impossible to have been caused between nine o'clock and five?

Objected to. Same objection. Also that there is proof tending to show that she was in the possession of the railroad company at nine o'clock of that morning. Objection overruled by the Court.

A. From nine o'clock, yes, it would be possible.

Counsel for plaintiff moves to strike out the answer. Motion overruled by the Court.

Q. From ten o'clock?

Same objection. Objection overruled by the Court.

A. Yes, that would be possible.

Q. Did you see this mare between 12 o'clock and 5?

175 A. Yes, between twelve and five.

Q. Between twelve and six?

A. Yes.

Q. When was the first time you saw her?

A. Between four and five.

Q. Did you see her before or after four?

A. It might have been four, possible before—just when I cannot remember, between four and five.

Q. Certainly not before four?

A. No.

Q. Any time before four?

A. No sir.

Q. Then your statement that she was kept in such a place that this conditions of fever and chills &c. would not have been cause is all based on the statements of somebody else to you?

A. No, when I got there I know what kind of a place she was in.

Q. How do you know she was kept in that place between 12 o'clock and four?

A. I don't see why she should be moved.

Q. How do you know she was kept in that particular place and had been there since 12 o'clock?

A. They insist upon it.

Q. How do you know?

A. They told me.

Q. You only know it because they told you?

A. I wasn't there at twelve.

Q. Someone told you?

A. Yes.

Redirect examination.

By M. R. TANNER:

Q. You have testified that this condition of fever and general physical condition of the mare was caused by exposure?

A. Yes sir.

176 Q. And that a short exposure of a few hours would not account for that condition?

A. No, she was too far advanced in the disease.

Q. In your opinion was it not too long exposure, reaching back over a period of several days that caused it?

Objected to as irrelevant, immaterial and incompetent. Objection overruled by the Court. To which ruling of the Court the defendant by its counsel then and there excepted.

A. I would have to answer that question as just the result of my experience in shipping horses and I should say yes.

Q. That it was from exposure of several days?

Objected to. Same objection. Objection overruled by the Court. To which ruling of the Court the defendant by its counsel then and there excepted.

A. Yes sir.

Q. This mare was a high bred mare, Doctor, wasn't she?

A. Yes sir.

Q. Trotting mare?

A. Yes sir.

Q. You have had considerable experience I presume with high bred stock?

A. Yes sir.

Q. What would be the effect of a delay on the cars in shipping this kind of a mare, from January 25 to January 29th, would it produce the condition you observed in this mare?

Objected to as immaterial, irrelevant and incompetent. Witness not qualified to speak, and assuming a state of facts not proved. Objection overruled by the Court. To which ruling of the Court the defendant by its counsel then and there excepted.

A. Yes.

By Mr. TANNER:

Q. It is not very probably is it?

177 Objected to as immaterial, irrelevant and incompetent. Objection overruled by the Court. To which ruling of the Court the defendant by its counsel then and there excepted.

A. No it is not.

Q. Did you notice any other of the horses in the shipment of Nathaniel T. Kirby?

A. No sir.

Q. You did not treat any other horses?

A. No sir.

Mr. SALZENSTEIN: Subject to objection this is the schedule of that Fast Horse Train?

The COURT: There is produced what is admitted to be the schedule of the running time of the Horse Special, which is offered in evidence by the plaintiff, the defendant objects to its admissibility on the ground that the defendant denies there was any special contract between the plaintiff and the defendant concerning or with reference to the Fast Horse Train, and on the further grounds that were any special contract made it would be illegal, invalid and wholly void, and therefore the testimony as to the actual time or schedule of the Fast Horse Train is inadmissible, irrelevant and immaterial in this case, no objection is made to the form of the contents but only to the substance as above stated, and the objection is overruled by the Court and the schedule admitted in evidence.

To which ruling of the Court the defendant by its counsel then and there excepted.

Said schedule so offered in evidence being in the words and figures following to-wit:

C. B.—4. (Domestic Horse Special.)
Union Stock Yards to Buffalo.
Character—Horse Special.

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	Arriving time.	Leaving time.	Connections.
U. S. Yards.....		5.00 P. M.	
Niles.....	9.00 P. M.	9.05 P. M.	
Jackson Jet.....	1.05 A. M.		
Detroit.....	3.40 A. M.	4.00 A. M.	
Windsor.....	4.10 A. M.	4.40 A. M.	
St. Thomas.....	8.50 A. M.	9.10 A. M.	
Victoria.....	3.00 P. M.	3.30 P. M.	
Black Rock.....	4.00 P. M.		
East Buffalo.....	5.00 P. M.		

This train will run on Thursday or other days on special order.

U. S. Yards.—Takes Horses for Buffalo and points East. Fills out with Other Live Stock.

N. T. KIRBY being recalled in answer to interrogatories propounded by Albert Salzenstein, Esq., testified as follows to-wit:

Q. What care was taken of Lou Blake and there other horses from the time you reached New York up to the time they — sold?

A. Just as good care as we could of them with my own foreman.

Q. Where were they first placed?

A. At Fess, Doer & Carroll's.

Q. What character of stables are those, were they at that time as far as healthy condition and the like?

A. They were very fine stables. I don't see how I could get in any better.

Q. As to warmth how were they, how protected from the cold?

A. Well, it is a splendid stable with a place to exercise if you want to around inside without having to go outside you didn't have to go outside for anything.

Q. How was it protected from wind and storms and cold?

A. Well, the stalls were very high partitions, were very high, and it was a large building, no drafts.

Q. What care was taken of those horses and the mare Lou Blake while at Fess, Doer & Carroll?

A. I had my foreman with me, he took charge of them and helped take care of them, and the details, all the men I wanted to help me in the stable, so I spared no pains in taking the best of care of them.

Q. What kind of care did they have when taken to Madison Square Garden?

A. Just the same care that I took up there.

179 Q. Now how are the stables at that place, the conditions for taking care of horses, protecting them from cold wind and so on?

A. The stables are beneath the track and all heated by steam, and a splendid place to take care of them.

Q. How about drafts, anything of that sort there?

A. There is no drafts unless you drop the window to make it so.

Q. What kind of care did they have while there?

A. The very best.

Q. I don't know whether I covered this in the right direction in regard to the charge of \$200.50 transportation charges, did you ultimately pay this?

A. Yes sir, it was charged to me in the returns from Easig Tippon & Company after the sale?

Witness on cross-examination in answer to interrogatories propounded by William L. Patton, Esq., testified as follows, to-wit:

Q. What time did you say the horses arrived at 130- street station?

A. Between six and eight o'clock, I think about eight o'clock in the morning.

Q. That was in the early morning?

A. Yes sir.

Q. Where were they from the time they arrived up to the time they went into Fess, Doer & Carroll's stables about noon, it was about noon was it not?

A. Yes sir.

Q. Where were they?

A. They were there standing waiting for the engine to take them down to unload at Fess, Doer & Carroll's stables.

Q. Still in the car?

A. Still in the car, yes.

Q. From the time that you arrived at 130- street until the time you got them into Fess, Doer & Carroll's stables?

A. Yes sir.

Q. Switched in?

180 A. Not switched in but stopped at crossings, delayed on account of crossings of railroads and such as that until they got their signals to move on.

Q. That handling and delay was an aggravation of any trouble that might already have been done was it not?

A. Oh, yes, in the same line.

Q. You cannot tell how much that contributed or how much the previous delay had done?

A. No sir, there is no way to figure that.

Q. Mr. SALZENSTEIN: In regard to that, it was hardly cross examination but to bring that out, what kind of movement was there of this car from 130 street to these stables of Fess, Doer & Carroll's?

A. Just simply a slow steady move, and when they come to a crossing they would stop until they got the signals to go on, then they would move on weaving its way down through the city.

Q. How were those delays you speak of compared with the delay

you had been subjected to prior to getting to 130 street you have already spoken of?

A. Very different, because there was no jerking of cars or switching of backward and forwards.

Q. You have spoken about the distance of Fess, Doer & Carroll's stables being four or five miles to 130 street, those blocks how do they compare with our streets in this city.

A. I don't know how many blocks it takes for a mile there, but it seemed to me like they were larger blocks than here, of course a difference between 130 street and 30 street which Fess, Doer and Carroll are on.

Q. Some additional blocks besides those you have mentioned?

A. Yes sir.

Q. Turning?

A. Yes sir.

Q. You can't tell how many miles it is then?

181 A. No, it wasn't straight away down of course.

Q. These horses were in the same car they had been in?

A. Yes sir.

Mr. SALZENSTEIN: The schedule time I understand is in the record and I won't read that to the jury now, that part of the pamphlet relating to this train or horse special.

Here plaintiff rested his case, whereupon the defendant to sustain the issues on its behalf introduced in evidence that is to say:

R. W. STUTTSMAN, being first duly sworn in answer to interrogatories propounded by William L. Patton, Esq. testified as follows to-wit:

Q. What is your name?

A. Robert W. Stuttzman.

Q. Where do you live?

A. Springfield

Q. What is your business?

A. Live Stock Agent for the Chicago and Alton Railroad.

Q. You were in the same business in January 1906 were you?

A. Yes sir.

Q. Just tell the jury what your duties are and were at that time as live stock agent of the Chicago & Alton railroad Company.

Q. Soliciting stock shipments for different markets for the Chicago & Alton Railroad.

Q. What do you mean by soliciting stock shipments?

A. Shipments that is from the territory covered by the Chicago & Alton Railroad business to go on that road to the different markets for the revenue that is in it.

Q. What do you have to do, or then had to do if anything with making the contract of shipments?

A. We don't make no contracts for shipment.

Q. What had you personally as Live Stock agent to do with making contracts with the people that you solicited business from?

182 A. Well, really we don't make any contracts.

Objection by plaintiff to the answer.

Q. That is what you had personally to do if anything with the making of the contracts of shipments with the person you solicited shipment from?

A. None whatever.

Q. What power or authority had you at that time to contract concerning the terms of the shipment with the shipper or the prospective shipper?

A. Well, I would have no power to make any kind of contract, just simply putting up the Chicago & Alton Railroad for that purpose putting their road before the shipper, there is the Chicago & Alton Railroad and we would like to have the shipment.

Q. Now, to whom after you solicited the business would you refer the shipper with reference to rates and so on?

A. The different agents at the different stations.

Q. The freight agents of the road?

A. Yes sir.

Q. I will ask you if you know Mr. Kirby?

A. I have met the gentleman several times.

Q. I call your attention to the shipment of some horses out of Springfield for New York in January 1905, what did you have to do with reference to soliciting that shipment?

A. Well I saw Mr. Kirby in regard to the shipment for New York.

Q. Where did you first see him?

A. I think possibly it was there at his shop there on Jefferson street.

Q. Well now, how did you know, how did you learn that he had stock to be shipped?

A. From one of our passenger agents or ticket agent there in the passenger station told me. Mr. Kirby had a shipment going to New York, if I wanted to see some one that I could see what to do with the shipment through for him.

183 Q. That was Will Connors, was it?

A. Yes sir, Will Connors.

Q. In pursuance of that information did you go to Mr. Kirby's shop?

A. Yes sir.

Q. For what purpose did you go?

A. I went for the purpose to see if I could get him to make that shipment over the C. & A. Railroad.

Q. What information did he give you with reference to the kind or character of stock it was that he wanted to have shipped?

A. He told me had a car of horses to go to New York.

Q. Did he tell you what kind of horses?

A. No sir.

Q. Did he tell you that it was a car of high bred trotting and packing stock?

Q. Never a word said about any particular stock of race horses.

Q. What if anything did he say to you about it being anything other than simply horses?

A. Nothing whatever.

Q. What did he tell you about where he wanted the horses shipped to?

A. Well, now you mean the destination, what street?

Q. Yes?

A. I don't remember just what destination any more than he wanted to go to New York.

Q. Did he tell you of any particular market that he wanted to send the horses to?

A. He mentioned there was going to be a sale commencing a certain date, I can't recall that date, and he wanted to be there on that market.

Q. Do you remember during how many days he told you that sale was to subsist?

A. He didn't say.

184 Q. What if anything was said about there being any necessity for the horses to get there on any particular day?

A. Nothing whatever.

Q. What knowledge if any did you have of any reason or necessity for the horses to arrive in New York on any particular day?

A. Nothing whatever, he simply wanted to be there on that market commencing I think on Tuesday, I don't remember which day it was now.

Q. For how many days about did that market run if he told you?

A. He didn't say.

Q. Now did he at that time say anything about the route that he wanted his horses to take?

A. Well, nothing special with the exception he wanted the best way to go.

Q. What did you tell him about that if anything?

A. I told him to go to Chicago and go over, he mentioned the fact he wanted to catch a certain train in Chicago.

Q. That is what I want you to tell me about?

A. I told him I didn't understand the situation in Chicago of the connecting lines enough to know but I would find out for him.

Q. First when did he tell you about his desire to catch a certain train?

A. Well he told me he wanted a special horse train, a friend of his shipped from Omaha to New York always went on a certain train and he went by Joliet.

Q. What did you tell him now in regard to that?

A. I told him there was a man named Donald at Lincoln Illinois, who was shipping horses every week, and I would go and see him and see how he was shipping horses, and I found out Mr.

Donald—

185 Q. On that occasion did you and he go any place from his shop?

A. Not at that time no sir.

Q. Did you and he go together over to the C. & A Freight Depot on that occasion?

A. We went over there in regard to the rate and in regard to a special car they had to have for that shipment.

Q. Explain to the jury what you mean by a special car?

A. He wanted what is called a Burton-Arms palace car, a car specially for horses, stalled off for horses.

Q. Who is it that arranges for these special cars, the railroad company or the shippers, the railroad company for the shipper or how?

A. The shipper handles that himself, but we have always practiced if a man wanted a Burton stock car, special car, we would order the car for him.

Q. Is that a part of the rate that a railroad gets as compensation for this car, or does that fare go to somebody else?

A. That goes to a prize car company.

Objected to by plaintiff as immaterial.

The COURT: It is part of the details, I think it might as well go in.

Q. Now on this occasion what if anything was said by Mr. Kirby about wanting a special horse car?

A. I think mentioned the fact what kind of a car he wanted to ship horses in, and left him to Mr. Eggleston I think him and I went over to see Mr. Eggleston at that time about the car.

Q. Now at the freight depot what conversation if any was had in the presence of you and Mr. Eggleston by Mr. Kirby with reference to the route he wanted these horses to go?

A. Well, Mr. Kirby wanted to go by way of Joliet, this friend of his had insisted on it.

Q. Was that conversation in Mr. Eggleston's presence?

186 A. Yes sir.

Q. Tell the jury what that was?

A. Well he mentioned the fact he would catch this Michigan horse train at Joliet and that is the way he wanted to go, he wanted to know if we could get there in time in the morning to catch that train, our train was due in Joliet I think at six o'clock in the morning.

Q. What was said by you about the proper way to go to the fast horse train if anything?

A. I told him I would look into that and see how we made those connections there at Joliet with the Michigan Central people, he wanted to go by the Michigan Central.

Q. By the fast train on the Michigan Central?

A. Yes sir.

Q. If you made any investigation with regard to the connection tell the jury what investigation you made?

A. Well I didn't understand the connection at Joliet, the different connections with the eastern lines and I goes up to Lincoln, Mr. Donald was a shipper who shipped a car every week from Lincoln, Illinois, to New York, did at that time.

Q. If you found out from Mr. Donald the connections which were

proper to be used in order to get the fast horse train tell the jury what they were?

Objected to by plaintiff.

The COURT: I understand that was communicated to the plaintiff later, I understand that the purpose is to show he communicated that information to the plaintiff.

Mr. PATTON: Yes sir.

The COURT: Upon that theory I think it ought to go in.

Q. What did you learn?

A. Mr. Donald told me that he always shipped by Chicago and the stock yard, he got to Chicago and the stock was unloaded
187 in the yard and then loaded up for the special train.

Objected to by plaintiff as not responsive to the question.

The COURT: I understand the purpose is to show that you communicated that.

Mr. PATTON: That he come back from Donald and told Kirby this very thing?

The COURT: Get right to it, if he had any conversation with Mr. Kirby about what he learned from Donald what did he tell Kirby.

Q. If you had after your trip to Lincoln a conversation with Mr. Kirby in the presence of anybody in regard to the movement that you found out about, in whose presence was that?

A. I went to Mr. Kirby's office and found Mr. Kirby in there and possibly other gentlemen in the ship there working I told him I had him fixed up all right I had learned by going by Chicago they could make that train at Chicago.

Q. What did he say to that?

A. He objected to going to Chicago, he had to go by Joliet, his friend from Omaha told him to go by Joliet and catch this train, the same fast stock train that left there.

Q. Now what more was said about it?

A. Well there was I don't know, just recollect what was particularly said.

Q. When was it after the time that you and Mr. Kirby went over to the freight depot and had a conversation with Mr. Eggleston about this thing?

A. Well, that was before, then we goes over again in regard to the car.

Q. I want to get what was the first conversation when Mr. Kirby and you and Mr. Eggleston were present with reference to this movement of the case?

A. Well, that was the first time I think I seen Mr. Kirby.

Q. That is what I want you to tell about?

A. We wanted to send the shipment by way of Chicago
188 and insisted on the shipment going by Chicago all the time.

Q. Who was present at that conversation when you was insisting on the shipment going by Chicago?

A. Mr. Eggleston and I and Mr. Kirby.

Q. Where?

A. In the freight depot.

Q. Was that the first day you had talked with Mr. Kirby?

A. Yes, we talked there that day, and he wanted to go by Joliet his friend wanted him to go by Joliet.

Q. In pursuance of his insistence about that what did you do with reference to making any inquiries as to the Joliet route?

Objected to by plaintiff as having been gone into before.

Q. I want to get it in sequence of time.

The COURT: The objection is overruled.

Q. After the talk between you and Mr. Egelston and Mr. Kirby was there another talk with Mr. Kirby about this same proposition?

A. Yes sir, that is after I found out that the shipment had to go by Chicago to make that train.

Q. What was that conversation and where was it?

A. That was in his shop some time after, several days, probably a couple of days afterwards, I got right on the train when I told him I would and *when* to Lincoln to see about it, how Donald shipped.

Q. After you come back from Donald you had this conversation in the shop?

A. Yes, sir.

Q. Now did you on the first or second occasion or on any other occasion contract or agree with Mr. Kirby that the Chicago & Alton Railroad Company would take his stock and would catch any particular train either through Joliet or out of Chicago?

A. No sir, no sir, we don't make any such contracts.

189 Objection by plaintiff to the last part of the answer and ask to have it stricken.

The COURT: The last part of the answer is stricken, it is not material what kind of contracts you do make, the question is what did you say to this man?

A. I made no contract.

Q. Did you say to him that you would guarantee that the stock would catch the fast horse special leaving Chicago at about 3 o'clock on Thursday, January 25th?

A. No sir.

Q. Did Mr. Egelston in your presence say that or that is substance?

A. I never heard it stated at all.

Q. What was the position taken by you and by Mr. Egelston with reference to the movement of this train at all times if you had any position?

Objected to by plaintiff. Objection sustained by the Court.
To which ruling of the Court the defendant by its counsel then and there excepted.

Q. Well what was said to Mr. Kirby by you or by Mr. Egelston in your presence with reference to what was the proper movement

of this car load of stock in order to catch that fast horse special out of Chicago.

A. I told Mr. Kirby it would have to go out on our number 8 which leaves here a little after 8 o'clock in the evening and go to the Chicago Stock Yard.

Q. What objections if any did he make to going to the stock yard and what reasons did he give?

A. He didn't want to go by the stock yards and he switched around the stock yard and didn't want to pay the two dollars extra stock yard charge.

Q. What reason did he give for wanting the Joliet movement if he gave any reason?

190 A. Nothing with the exception he didn't want to go through Chicago and he switched around through Chicago.

Q. What information did he say he had, if he said he had any information, about the feasibility of making the Joliet movement?

A. He said he had a friend that shipped from Omaha to New York and his friend told him to ship, to have them go by way of Joliet, to make that train by way of Joliet and he wanted to go by Joliet.

Q. What did you have if anything to do with the making of the agreement of shipments, or contracts of shipments between Mr. Kirby and the Chicago & Alton Railroad?

A. Nothing at all.

Q. What was your office in the transaction, what did you do?

A. I just simply went to Mr. Kirby and offered him our services for Chicago.

Q. What did you say at any time during the transaction with reference to offering or agreeing or guaranteeing to catch the fast horse special by way of Joliet?

A. I didn't make, I didn't give him no agreement of any kind.

Q. What did you know if anything with reference to the movement of the Michigan Central trains out of Joliet with reference to their connection or possible connection with the fast horse special.

Objected to by plaintiff. Objection overruled by the Court.

A. Nothing at all with the exception of their time card shown in the official guide.

Q. What was the first you learned or heard of a possibility of catching the fast horse special out of Joliet and from whom did you learn it?

191 A. From Mr. Kirby.

Q. Were you present at any time when Mr. Kirby was at the depot inquiring about the rates of shipments?

A. Well, nothing only when Mr. Kirby and I went there together to see about the rate and about the special car that he wanted to get.

Q. I presume you didn't know anything about the rate proposition?

A. No I did not, I think we gave him a rate at that time.

Q. Whose business was it if you know to look up and give the information about the rate?

A. Well, Mr. Eggleston our freight agent there; well I would have to go to some official to get the rate, I could not make the rate myself. I would have to go and get the rate the same as Mr. Kirby had, he had access to the rate the same as I would.

Q. When you say that Mr. Kirby had the same access to go and get the rate the same as you had, what do you mean?

A. Why to go to some agent and get the rate, the same local agent.

Q. What documents if any were kept in the local freight depot here at Springfield from which the local freight agent or any body else could ascertain the joint inter-state rate between Springfield and New York?

Objected to by plaintiff as improper and leading in view of the questions preceding. Objection overruled by the Court.

A. The public has access to the rates at any time they desire to see a rate at any given point, from any point to another point.

Q. Was the official classification and the joint interstate rate on file in the office of the local freight agent at Springfield at the time of the conversation that you are talking about with Mr. Kirby?

A. Yes sir.

Q. I show you a book marked on the cover Official Classification Number 27 to take effect January 1, 1906 superseding Official Classification Number 26 subject to change without notice except such as is required under the interstate commerce law, and I will ask you what that is?

A. Well, that is a classification of freights, of commodities to arrive at a rate.

Q. Was a copy of that on file in the office of the local freight agent at Springfield at the time of this jammering back and forth between you and Mr. Kirby?

Objected to by plaintiff as leading and immaterial and irrelevant to the issues, whether it was on file or not on file we say cuts no figure.

The COURT: I am rather disposed to overrule the objection and allow the answer to come, of course with reference to this matter in the end I will have to instruct the jury when we see what the case develops, I don't feel safe in excluding it.

Q. Was there a copy of that in the office, was there or was there not?

A. Yes sir.

Q. State what was the situation with reference to the access of the public to that official classification?

A. The public has access to these rates, and this is a part of the rate and all they have to do is to come and ask.

Q. What if anything was there in the public part of the railway station with reference to notice to the public in regard to their access to these rates?

A. They have notices posted in all stations.

Q. Was there such notice published in this station?

A. Yes sir.

C.&A. GFD16500
OFFICIAL GFD13500

CLASSIFICATION

No. 27.

TAKE EFFECT JANUARY 1, 1906.

SUPERSEDING OFFICIAL CLASSIFICATION No. 26.

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193 Q. Now I will ask that the official classification number 27 be marked Exhibit "D." Now I hand you a paper which I ask to be marked Exhibit "E" a paper marked on the face joint freight through tariff, naming rates on commodities, also live stock, and ask you to state if that was the joint interstate tariff in force and effect at the time of this shipment?

Objected to as immaterial and leading. Objection overruled by the court.

Q. Do you or not know?

A. Yes, this is.

Q. We now offer the official classification and the joint through freight tariff being marked Exhibit "D" and "E."

Objected to by plaintiff.

The COURT: The objection is overruled for the time being at least, the court will admit them in evidence, what use he will make of them later will be determined.

Mr. PATTON: I presume inasmuch as there are so many pages of this classification for the purpose of the record it might be better to specify such parts of it as I am offering.

The COURT: Specify if you care to.

Mr. SALZENSTEIN: From one point of view it all ought to go in.

Mr. PATTON: Well, I don't care, let it all go in, I offer it in its entirety, as well the joint tariff rate in its entirety:

Said Exhibits "D" and "E" so offered being as follows to-wit:

(Here follow fac-similes, marked pages 194, 194a to 194c, 195, 195a to 195c.)

196 Witness on cross-examination in answer to interrogatories propounded by James M. Graham, Esq. testified as follows to-wit:

Q. Mr. Stuttzman, how long did you say you had been with the Alton as live stock agent?

A. Since 1905.

Q. In Springfield?

A. Yes sir.

Q. And how wide is your field of operation?

A. Illinois.

Q. The whole state?

A. Yes sir.

Q. And your business is to induce shippers to send their stuff over the Alton, and not over some other road?

A. Over a good road, over the Alton.

Q. A part of your business of course is to show him the advantages of sending stuff your way.

A. Yes sir.

Q. Now in this particular shipment there would be no difference in rates, I think you said you knew that much about the rate question, that your competing road from Springfield to the destination would carry the stuff at the same rate that you would?

A. Yes sir, he described the situation first.

Q. Well yes, the situation, you know more about it than I do?

A. The representation Mr. Kirby gave me of the stock the rate was the same on it yes.

Q. The Wabash and the Illinois Central were your competitors?

A. I didn't know whether they were or not.

Q. Is it true that you did know?

A. Well, they are competitors.

Q. No, in this case isn't it true you did know they were your competitors?

A. No, well there was nothing said about any competitors.

Q. Didn't Mr. Kirby tell you then he had been shipping theretofore over the Wabash?

197 A. He possibly did, yes sir.

Q. And you wanted him to ship over the Alton?

A. Yes sir.

Q. And as you could not offer him any advantage in rates I suppose you were telling him how much faster and better the Alton would take it than the other roads?

A. Well, I done my best.

Q. That was part of your business, that is what you were there for?

A. Yes sir.

Q. And of course you did your best as you say and realized; now wasn't that question talked over in connection with making this fast horse special on the Michigan Central?

A. Yes, we talked about that, yes.

Q. And you represented to him that the Alton could do that better than the Wabash or any other road?

A. Oh, I don't think I said that.

Q. Well, in substance you gave him to understand that.

A. I wanted him to go by way of the Alton?

Q. The question with him was to catch this particular train?

A. Yes sir.

Q. And you were there to tell him how he could do that over the Alton better than any other road?

A. Well, I didn't mention any other road at all, no other road, I didn't go into that with him at all.

Q. You did talk about the Wabash there particularly didn't you?

A. No sir.

Q. Didn't you know that the Wabash or the Central could make that connection the same way as well as the Alton and the same way?

A. No sir, I didn't know it.

Q. Didn't you know the Illinois Central and the Wabash ran from Springfield to Chicago?

198 A. Yes, but I didn't know nothing about their connections.

Q. I know, but you know they had roads running there?

A. Certainly I knew that.

Q. If they went to Chicago they must cross this Joliet cut off somewhere musn't they?

A. Not exactly so.

Q. How could they go to Chicago from Springfield without crossing it?

A. Well if I had the commissioner's map here I might show you, of course they might do it, I don't know.

Q. Do you know whether they could do it or not, has the Illinois Central any line from here to Chicago without going around by Dixon or some place that would reach Chicago without going over the Joliet cut off?

A. I could not answer what the Illinois Central could do in making this connection.

Q. You know the way the Illinois Central runs from here to Chicago?

A. Mr. Graham I know they have a railroad from here to Chicago I don't know about their connections.

Q. Don't you know they run to Gilman, through Gilman and Kankakee into Chicago?

A. Certainly I do.

Q. Didn't you know in going that way they must cross over the Joliet cut off?

A. I don't know nothing about their connections.

Q. I simply ask you about a physical fact.

Q. That they have a railroad to Chicago?

Q. And that railroad crosses the Joliet cut off of which we have been talking.

A. I could not answer that, I don't know.

Q. Well *do you* know don't you that the Illinois Central lies east of Joliet?

- A. If you will get your geography and map you will find it don't.
- Q. Do you mean then that the road running from here to
- 199 Chicago through to Kankakee runs on the west side of Joliet?
- A. No sir.
- Q. Does it run east of it?
- A. It certainly does.
- Q. Must it not cross a road that runs from Joliet east?
- A. Yes sir, lots of roads.
- Q. Isn't that also true of the Wabash?
- A. Yes sir.
- Q. You knew that at that time didn't you?
- A. That they cross what?
- Q. That Joliet cut off this side of Chicago?
- A. No, I don't know now Mr. Graham.
- Q. Well, if you don't know it that is an answer?
- A. I will show you why I don't know if you will let me.
- Q. You say you don't and I am bound to accept your statement of the fact.
- A. The Joliet cut off and the Michigan Railroad are two different propositions.
- Q. But you don't know?
- A. I know they cross the Michigan Central railroad.
- Q. I say you know where that lies don't you, running from Joliet very close to it—
- Q. I didn't know where it connected with the Michigan Central.
- Q. You know there is such a road and in a general way knew where it lies don't you?
- A. Which road?
- Q. The so-called Joliet cut-off.
- A. No, I don't.
- Q. You know where Joliet is?
- A. Yes sir.
- Q. You know where Michigan City is?
- A. No, I don't.
- Q. Don't you know where Michigan City is?
- 200 A. I know it is around in Indiana.
- Q. And you know it is on the shore of Lake Michigan?
- A. Yes sir.
- Q. Near the south east corner of the lake?
- A. Yes sir.
- Q. Don't you in a general way know how the road runs from Joliet to Michigan City, from one point to the other?
- A. The Joliet branch don't run there.
- Q. Where does it run?
- A. It connects with the Michigan Central before it gets to Michigan City.
- Q. At what point?
- A. I don't know what point.
- Q. Don't it connect there at Lake?
- A. I don't know that they do, I have been trying to answer your question all the way along that way.
- Q. Very well, I don't want an argument with you, you do know

do you not that wherever it connects with the Michigan Central both the roads I mentioned cut those cut off- before getting into Chicago?

A. No, I do not.

Q. Do you say that is not so?

A. It possibly is so, but I say I don't know.

Q. Now you had no monetary inducement to offer Mr. Kirby had you?

A. Oh, no.

Q. You could not say to him we will carry your stock for less than either of these other roads?

A. No sir.

Q. You could only offer him better service and quicker connections, all inducements you had was it not?

A. All the inducement I had.

Q. The Arms Palace car which he wanted was equally accessible on either the Central or Wabash?

A. Sure.

201 Q. They could get just as good a car as the Alton could?

A. The same car.

Q. And get it probably just as quick?

A. Yes sir.

Q. Only in the matter of quicker service or better connection you had any special inducements to offer?

A. Yes sir.

Q. Could any other road give him a better car?

A. No sir.

Q. Or quicker car?

A. No sir.

Q. Only better connection and better service?

A. Yes, I don't say better connection.

Q. Now what inducement had you, just tell the jury any of the inducements that you say you had to offer as reasons why he should quit the Wabash and patronize the Alton?

A. I didn't say he had quit the Wabash, I had no inducement whatever.

Q. Didn't he tell you he had shipped over the Wabash theretofore?

A. Possibly he had.

Q. You had no personal acquaintance with him which would be an inducement to patronize the Alton because of your connection with it?

A. O no.

Q. You didn't know him before that time?

A. Oh, yes I knew of Mr. Kirby.

Q. Not in a business way?

A. Yes, I had known him in a business way.

Q. Would you say it was on any account of any personal friendship?

A. No sir.

Q. You didn't know of it until Mr. Conor told you about it?

A. No sir.

Q. You went to see him because Will Connor told you that he had some stuff to ship?

A. Yes sir.

Q. In fact Mr. Connor told you that Mr. Kirby had four-
202 ten horses to ship to New York?

A. I don't know how many, I remember he had a car of horses to go.

Q. Any way it was Mr. Connor who informed you of it?

A. Yes sir.

Q. Then you went to Mr. Kirby?

A. I did.

Q. How long had you known Mr. Kirby?

A. Oh, I say known him, I didn't know him, just knew him when I saw him. I knew Mr. Kirby when he was in Springfield and also in Jacksonville.

Q. You knew the business he was in?

A. I knew Mr. Kirby when I went to see him, that is I knew him by sight was all.

Q. You have overlooked the question I asked you, you knew the business he was in here didn't you?

A. No sir.

Q. Didn't you know he kept a horse sho-ing shop?

A. No sir.

Q. Didn't you know that he reared or trained or developed trot-
ting horses?

A. No sir.

Q. And kept a barn at the fair ground?

A. No sir.

Q. You didn't know those things?

A. No sir.

Q. Well, did you introduce yourself to him when you went to the shop?

A. Yes sir.

Q. And you brought up the question of shipping the horses?

A. Yes sir.

Q. Told him what you were there for?

A. Yes sir.

Q. Now wasn't the question of rate mentioned in that conversa-
tion?

203 A. It might have possibly been.

Q. And you could not then tell him what the freight would be to New York?

A. No sir.

Q. And you went then to someone who told you?

A. Him and I went over to the freight office.

Q. That was Mr. Egelston the agent?

A. Yes sir.

Q. And Mr. Egelston did not tell you then either, he said he would ascertain didn't he?

A. I think so something of that kind he didn't have time to look it up at the time.

Q. Anyhow he said he would let you know?

A. Yes sir.

Q. Do you know of your own knowledge whether he did let him know or not?

A. No, I do not.

Q. You don't know if he let him know about it, you don't know when he did?

A. No, I don't know that.

Q. How long were you and Mr. Kirby with Mr. Egelston at that time?

A. Oh, probably four or five minutes.

Q. It was a short call?

A. Yes sir.

Q. And the substance of all that transpired there was that Mr. Kirby had to ship to New York and you wanted to get the shipment over the road, and he wanted to know what the rate was, and you folks agreed or Egelston did to find out and let him know?

A. Yes sir.

Q. And when he did let him know you cannot state of your own knowledge?

204 A. No sir.

Q. Now later on you saw Mr. Kirby again I think at his shop the shop but not the next time you saw him?

A. At the shop I think it was, yes sir.

Q. And didn't you tell him on that occasion that you were ready to make arrangement for the shipment?

A. I told him we had, that was the time I had seen Mr. Donald and told him how I had him rigged up to go by the way of Chicago.

Q. Donald, is that the Lincoln man?

A. The Lincoln man I went to see.

Q. Was it between the first visit to Mr. Kirby's shop and the second visit to him you had seen Donald?

A. The second visit.

Q. Wasn't it after the second visit don't you remember now isn't it this way Mr. Stuttsman, that before the second visit you had found out that you could make the connection, and then you went to him and reported to him that the proper way to go was the stock yard, that he objected to that and wanted to avoid having his horses knocked around in switching in the stock yard, and that then after that you saw Donald to find out about the best way to ship?

A. Possibly the second or third time, I don't recall the time I went to see him.

Q. Well when do you say it was then, which one of your calls at Mr. Kirby's was it when that question was discussed about avoiding the stock yard?

A. That was right in the start.

Q. And using the Joliet cut off?

A. That was the first time I saw Mr. Kirby.

Q. You think that was on the first trip you made there?

A. Yes sir.

Q. Now let me call your attention again, isn't it true that at the

first meeting he declined to talk real business to you until you first told him the rate was, that you didn't know the rate, and
205 the agent did not then know it, and there was no talk about how the shipment was to be made until after the agent had informed him what the rate was?

A. Mr. Kirby first spoke he had a friend that shipped through by way of Joliet, and he would like to go by way of Joliet.

Q. Is it not true that was not talked of until after the rate was made?

A. No, that Joliet question come up the first visit I had with Mr. Kirby.

Q. And before any mention was made of what the freight cost would be?

A. Yes, he mentioned that fact about the railroad connection.

Q. Well he did, didn't he speak about the rate in that first talk?

A. Possibly.

Q. Well, can't you make it stronger than possibly, haven't you a recollection that the question came up and you could not answer it and you went to the agent to get the answer and he could not answer it?

A. I will answer it, yes.

Q. How many calls did you make at his shop altogether as you remember it?

A. Well, two or three calls.

Q. Well, could you be more specific, as to whether it was two or three?

A. No, I could not, it has been a long time ago Mr. Graham.

Q. Did you know anyone else who was in the shop at either of those occasions?

A. No I don't remember who was in the shop.

Q. That shop you speak of of course is the shop across the street from the St. Nicholas Hotel.

A. Yes sir.

206 Q. What did he say about the switching charge in the stock yards, give what he said on that point?

A. Well he didn't want to go by way of Chicago for the reason there was \$2.00 more additional switching charges by going through the stock yards.

Q. As near as you recall those are the words he used, I don't want to go by way of Chicago because they will charge me two dollars extra for switching charges, that is the substance of what he said is it?

A. Yes sir, he thought he would rather go by way of Joliet this friend wanted him to go by Joliet.

Q. Mr. Stuttsman, will you kindly show me, I am metaphorically speaking from Missouri, will you show me how Mr. Kirby could tell from that what the rate was on a car load of horses from Springfield to New York? (Hands witness Ex. E.)

A. There is no more to that than this, this will give you the classification. (Witness has Ex. D.)

Q. My question was will you show me how he could find out?

A. Why certainly.

Q. I am waiting.

A. All right, I will show you, there is the index, there you see live stock.

Q. Live stock, L. C. L.?

A. Yes, hold on I ain't through showing you yet.

Q. Take a step at a time, he would not know what L. C. L. means?

A. That means less than car lots.

Q. He would have exhausted a thousand guesses before hitting the right one, here is C. L. that is car load?

A. Up here is the page to determine the horses, page 81 item 9 do you see all that?

A. Yes, I see all that, there it is, is all of — there?

Q. To find out the classification of live stock, or grades of live stock.

A. Now I hand you Exhibit "E" I believe it is designated and ask you to show me how Mr. Kirby or myself could interpret that?

207 A. You see here New York is a group, made in different groups on this the different groups means there are certain points, stations and different localities throughout the State of Illinois, Indiana, Iowa and other points.

Q. I see the expression group A, show me on this pamphlet where is group A as having an explanation?

A. Yes, here is group A here, Alton, Bloomington, East St. Louis and also Springfield, Illinois.

Q. What does that group go in?

A. It will come in group A, you asked me what group A was, I am showing you what group A is.

Q. Perhaps I am a little stupid about these matters, now then after knowing what is there where would I get the other information from?

A. You will have to read the thing over to get it.

Q. Read it all?

A. Not all of it, no sir.

Q. How would I know what I wanted to get without reading it all, if I didn't read it all how I would know there wasn't something I did not read that might modify what I had read?

A. You would have to turn here to the different rates that the groups refers to.

Q. Isn't it true that an ordinary person could not out of these two Exhibits find what he wanted with any reasonable degree of certainty?

Objected to by defendant on the ground that by the law the papers are made sufficient so that the ordinary person must apprise himself. Objection overruled by the Court.

To which ruling of the Court the defendant by its counsel then and there excepted.

A. Well, I am not ignorant, I don't know as to anybody else.

Q. You cannot tell then how a man of less intelligence than you would fare in the examination of these exhibits?

A. No, I think the rates are very plain.

Q. You say that these were in the office at the time you
208 and Mr. Kirby made your first visit there?

A. Oh, yes.

Q. Will you tell the jury why it was that the agent could not then tell you what the rate would be?

A. No, I could not tell you.

Q. He is not intelligent as you?

A. Yes, probably he didn't have time to look it up right at the time being.

Q. But you think Mr. Kirby could have done it do you?

A. Oh, certainly.

Q. You know Mr. Stetsman as a matter of fact that the horses were shipped over your line by way of Joliet and the Michigan Central?

A. Yes sir.

Q. Did you see the way bill yourself?

A. I don't think I had ever seen the way bill Mr. Graham, I don't *handling* the billing.

A. I know, unless you happened to see it, it is not a part of your ordinary duties?

A. I cannot remember seeing it.

F. S. BROWN being first duly sworn in answer to interrogatories propounded by William L. Patton, Esq., testified as follows to-wit:

Q. What is your name?

A. F. S. Brown.

Q. Where do you live Mr. Brown?

A. Michigan City, Indiana.

Q. What is your business?

A. Train master of the Michigan Central.

Q. What was your business in January 1906?

A. The same.

Q. What are the duties or what were then the duties of train master of the Michigan Central at Michigan City Indiana?

A. Supervising of all train service.

Q. As such train master what familiarity had you with the train service of the Michigan Central between Chicago, Joliet and
209 Michigan City?

A. All the familiarity necessary to make schedules and direct the movement of all classes of freight and trains.

Q. Directing your attention to the fast horse train which has been referred to in this case known in your schedule as C. B. 4, was that train a regular train in January 1906, was that one of the regular trains of your road?

A. Yes sir.

Q. On what days did that train run out of Chicago carrying goods eastward to New York and other points?

A. On Tuesdays, Thursdays and Fridays.

Q. What was the leaving time of that train on Thursday January 25, 1906; first I will ask you from what point in Chicago did that train start?

A. From the point known as the Michigan Central shed in the Union Stock Yard.

Q. At what point did that train receive shipments of live stock from connecting lines?

A. At the Union Stock Yards.

Q. What time was that train due to leave the Michigan Stock Yards on January 25, 1906?

A. 4 P. M.

Q. Where was the first point east of the Michigan Stock Yard that your railroad would receive a car load shipment of stock and incorporate it in that train?

Objected to by plaintiff, we take it it is based on the schedule.

Q. It is based on his knowledge of the train's movement.

Objection overruled by the Court.

A. Detroit.

Q. I will ask you if you know of a town called Lake?

A. Yes sir.

Q. At that time would your railroad have accepted a shipment a car load shipment of stock to be incorporated in that train C. B. 4 at Lake?

210 A. No sir.

Objected to by plaintiff on the ground that this contract testified to by Mr. Kirby was a connection by way of Joliet, Lake was not mentioned, Lake mentioned was connecting with the first train he could get, not this train, he didn't care whether he went to Lake, Michigan City or where.

Q. I am going to ask about Lake and Michigan City any other connection, Joliet and Michigan City, I am going to take it item by item.

Mr. SALZENSTEIN: But we don't care about that, we have your contract.

Mr. PATTON: We do care, and we say you haven't a contract, we mean to show by this witness that no car load of stock handled through Joliet could *not* have been received on that fast horse train.

The COURT: The objection is overruled he may answer.

Q. I will withdraw that question, and I will ask you what your railroad would have done with reference to a car load of stock tendered at Joliet by a connecting line for shipment on the fast horse special, whether it would have accepted it or not.

Objected to by plaintiff as being a question that no man could answer, what they would have done, he can only tell what the rules had been or what they were, and our objection is whether they would have accepted them or not is not the true question, we have

their bill of lading, they did agree to ship that way, the C. & A. They knew about the trains.

The COURT: The testimony is very much like that admitted on the other side, simply circumstantial as tending to corroborate their theory of what the contract was, if we assume the contract is as you claim then this testimony would be incompetent, they claim that they did not make any contract to connect you with the Michigan Central at Joliet, and as tending to show the probabilities of their position they want to show in due course of business it could not

211 have been done, like very much of the testimony admitted on the other side in the nature of corroboration.

Q. (Interrogatory read.)

The COURT: In due course of business as you was taking it at that time.

Q. May I make a statement in connection with that?

The COURT: Answer the question of you can?

A. We don't run a connecting train from Joliet for the horse train.

Objected to by plaintiff as irrelevant and — responsive to the question asked. Objection sustained by the Court. To which ruling of the Court the defendant by its counsel then and there excepted.

Q. If you can answer the question just answer that question and I will ask you a further question. (Question read.)

A. No sir, we would not have accepted that car for movement on the horse train at Joliet.

Q. How many trains a day, regular trains a day, did you have out of Joliet eastward for connection with your main lines, freight trains I am talking about?

A. At the time of the shipment, one.

Q. What time of the day did that train leave Joliet?

A. 5.15 P. M. Pardon me, we have the two trains, local freight and through fast freight.

Q. Now what time did the local freight leave Joliet?

A. 6.00 A. M.

Q. Assuming that a car of horses had been tendered to your people at Joliet by the Chicago & Alton Railroad Company prior to the departure of your local freight at 6.00 o'clock in the morning for connection with the fast horse special, would you or would you not at that time in the due course of business have accepted that car of stock on that local freight for connection with the fast horse special?

A. No sir.

Q. Just explain why.

A. We have a train carrying beef, stock and high class merchandise leaving Joliet each night at 5.15, that train takes
212 all the high class risks which is tendered the previous twenty four hours, any shipment tendered after the departure of that train at 5.15 makes the same connection at Buffalo, New York or Boston by being held in Joliet for the next night's business, as it would if forwarded on the local by Michigan City or any other in-

intermediate terminal, for the reason that train is the last train out of Joliet which connects with the fast train out of Michigan City, therefor- the fast freight the following day and following night protects any more movement later.

Q. Assuming that the car load of stock about which we are having this trouble had been tendered to you and received by you for shipment on that morning train, local freight, would it in due course of business on your road have reached New York any earlier than it would have reached it by waiting in Joliet all day and taking that fast train at night?

A. No sir, it would not have been handled on that train out of the Joliet yard.

Q. Why not?

A. The local freights does the local switching at intermediate points between Joliet and Lake and turns at Lake and returned to Joliet doing the work at the elevators at Matteson with the connecting line that we cross at Matteson Chicago Heights, Hushville, Griffith, and Liverpool, it picks up sets out and switches both ways all it has.

Q. What is there about that that would prevent the picking up a car load of horses on that train?

A. We don't handle any horses or any high class freight on that local?

A. If the Chicago & Alton Railroad had tendered to you prior to the departure of that train at such a convenient time as that it would enable the proper switching to be done, a car load of horses for shipment east to connect with the fast horse special what would have been the action of the Michigan Central Railroad Company in regard to that car load of stock?

213 A. Hold it in Joliet for the 5.15 train.

Q. Are connections made, or were at that time connections made with the fast horse special via Joliet?

A. No sir.

Q. If a car load of stock had been delivered to the local freight train in the morning by the Alton Railroad and if you had taken it what would have been necessary in order to get it onto that fast horse train, what movement would it have had to make?

A. It would have been necessary to move it on that train to Lake and from Lake local to Michigan City, and if it reached there in advance of the horse train it would have been put on the horse train at Michigan City the arrival of the main line local at Michigan City is problematical according to the nature of the business, and the horse train would not have been stopped at any interior station to pick up a car load of horses as the train runs from the Union Stock Yard and arrangements for going on the horse train are made at the Union Stock Yard and arrangements for going on the horse train are made at the Union Stock Yard by all shippers.

Q. To get the thing concretely, arrangements are made for delivery at the Union Stock Yard for that fast horse train, are deliveries made and accepted other than at Union Stock Yards for delivery on that train?

A. No, no deliveries are made no cars are accepted for movement on the horse train as the horse train is run from the Union Stock Yard only, and for the accommodation of stock shippers from the Union Stock Yard.

Q. Assuming a shipper to ship a car load of stock from Springfield, Illinois, to New York by the Chicago & Alton and your fast horse train leaving Springfield on the night of Wednesday the 24th of January what was the proper movement of that car on the rails of the Alton Railroad and connecting lines in order to get it into your fast horse train?

A. Union Stock Yard delivery.

214 Witness on cross-examination in answer to interrogatories propounded by James M. Graham, Esq., testified as follows, to-wit:

Q. Your position with the Michigan was train dispatcher?

A. Train master.

Q. And that gave you charge of a division of the road?

A. Yes sir.

Q. Who is your next superior officer?

A. J. H. Snider superintendent at Chicago.

Q. If J. H. Snider at Chicago should ask you to order a particular train to stop anywhere you would do it?

A. Yes sir.

Q. You speak about one of the trains stopping at Mattison for switching, where is Mattison?

A. About 22 miles east of Joliet.

Q. What does the Joliet cut off cross at Mattison?

A. The Illinois Central.

Q. A great deal of work is done there in the way of switching I suppose?

A. Yes sir.

Q. And the switching connections and arrangements are quite ample there?

A. Plenty.

Q. That is the same Illinois Central which goes from Springfield to Chicago.

A. Well, it is not the main line of the Illinois Central.

Q. Well, from here to Gilman and straight on into Chicago.

A. I understand.

Q. You came over it coming here I presume?

A. No sir.

Q. Well, it is none of my business how you came; where does that line cross the Wabash?

A. What line?

Q. The cut off as we are calling it for short, cut off the main?

A. It don't cross it.

215 Q. How does it do it without crossing it?

A. The Wabash goes under it.

Q. By that do you mean to say it does not cross it at all?

A. It crosses it.

Q. Are you willing to stand by that as your testimony in this case that because the Wabash goes under it the other road does not cross it, are you willing to stand by that as your testimony?

A. That the Joliet division goes over the Wabash at what place?

Q. Do you wish to stand by that statement as your testimony the statement that the Joliet road cut off does not cross the Wabash?

A. No, the Joliet division crosses the Wabash.

Q. The Joliet cut off as we are calling it is a part of the Michigan Central?

A. Yes sir.

Q. How far is it from Joliet to Michigan City?

A. 68 miles.

Q. How far is it from Joliet to the Union Stock Yards in Chicago?

A. By the way of the Michigan Central?

A. By way of the Chicago & Alton?

A. I don't know the distance on the Chicago & Alton.

Q. Isn't it about sixty miles?

A. I don't think it is that far.

Q. How far do you think it is?

A. I think about forty miles.

Q. Have you any knowledge on that point Mr. Brown?

A. No sir.

Q. Or just guessing at it?

A. Well, guessing it more from the fact I make trips right frequently between Joliet and Chicago on various roads and judging by the distance, I don't know exactly how far it is.

216 Q. How far is it from the Union Stock Yard to Michigan City by your road?

A. Fifty eight miles, we have two routes from the stock yard to Michigan City.

Q. How far is it by each?

A. One is sixty eight and the other is fifty eight.

Q. And the fifty eight, how far did you say it was from Joliet to Michigan City?

A. Sixty eight.

Q. Just the same distance as the longer of these routes and ten miles less than the—

A. The short route.

Q. How long had the arrangement which you have testified to been in existence with reference to the attaching of cars from Joliet by the cut off to this fast horse special on the main line?

A. The fast train started back I think it is in fact September 1st, 1903, November 1st, I was mistaken.

Q. Well anyhow it had been two or three years prior to this?

A. Yes sir.

Q. What was the time of the local from out of Joliet in the morning Mr. Brown?

A. At that particular time.

Q. At that time?

A. Six o'clock.

Q. 6.10.

A. 6.00 A. M. I think.

Q. You gave it as 6.10 did you not to Mr. Patton?

A. No I think 6.00 A. M.

Q. Was there any other train, freight train I mean, due out of Joliet from that time until the afternoon train of which you speak?

A. No sir.

Q. Those two were the only ones?

A. You are asking me about trains due out of there, we run a great many extras.

217 Q. I am speaking of the schedules trains, were you at that time running extras?

A. When the occasion demanded.

Q. How soon before the extra started would you know that it was going to run?

A. Extras would follow out the 5.15 train.

Q. In the afternoon?

A. In the afternoon and pick up the freight set out at the different stations.

Q. Didn't extras sometimes leave in the forenoon, at 10.00 or 11.00 o'clock.

A. Yes sir.

Q. That was not an unusual circumstance?

A. No sir.

Q. Mr. Brown, how many men in the management of the road above you would have the right to direct you as to the movement of trains, where they should stop or when?

A. Well, the general superintendent is the one that has the general direction of the movement of freight, and his orders are given to the division superintendent and by him to his inferiors.

Q. An order from either one of those as far as you were concerned would be final?

A. Perfectly.

E. J. STOECKLE being first duly sworn in answer to interrogatories propounded by William L. Patton, Esq., testified as follows, to-wit:

Q. What is your name?

A. E. L. Stoeckle.

Q. Where do you live?

A. Michigan City.

Q. What is your business now?

A. Train dispatcher.

Q. For what railroad?

218 A. The Michigan Central.

Q. What was your business in January 1906?

A. Train dispatcher.

Q. Have you your train sheet showing the movements of what we are terming here the fast horse special out of Chicago on the 25th day of January 1906?

A. I have.

Q. By reference to your train sheet tell us what time that train left the Union Stock Yards at Chicago on that day?

A. It left the Union Stock Yards at 4.40 P. M.

Q. What did it have on the train?

A. It had two cars for Buffalo, New York, one car of Swift beef and nineteen cars of horses.

Q. Where was the first stopping point for that train out of Chicago.

A. That is for any purpose whatever?

Q. No, for the purpose of taking on any more cars?

A. Well, Michigan City would have been the only proper point.

Q. What time did the train get to Michigan City?

A. At 8.20 P. M.

Q. What if any cars were added on at Michigan City?

A. None, four were taken off.

Q. What was the time of that train at Michigan City that night?

A. 8.20.

Q. Now turn your attention to the local freight train that leaves Joliet sometime during the morning at that time, what was your symbol for that train?

A. The local?

Q. Yes.

A. It run by numbers, number 146.

Q. What time did that train leave Joliet on the morning of January 25th?

A. It left Joliet at 6.00 o'clock consisting of eight cars.

Q. Where was its first stop out of Joliet?

A. Frankfort, Indiana.

219 Q. What was done there?

A. Local switching.

Q. How long was it at Frankfort, Indiana?

A. Ten minutes.

Q. What time did it get to Frankfort, Indiana?

A. 6.40.

Q. What was the easterly terminus of the run of that train?

A. Lake station.

Q. What time did it get to Lake station?

A. 10.45 A. M.

Q. Now in the regular course of business would or would not a car load of stock out of Joliet have made quicker movement by leaving Joliet on that train than on the train which left at 5.15 in the evening, a quicker movement to New York City?

A. Well, I think Mr. Patton it would if it went right through.

Q. But under the course of business and the train movements on your road at that time?

A. Whether this car of horses if I understand you right would have made better time by going through on the local than waiting for this evening train?

A. Yes?

Q. It probably would have reached, well, it would have reached Michigan City two hours earlier.

Q. Would it at Lake have been enabled to get into the fast horse special?

A. No sir.

Q. Would it have been enabled at Michigan City to get into the fast horse special?

A. Well possibly it would, according to the time on the train sheets here, we have other fast trains that leaves previous to the horse train, it might have been put on there or held for the horse train.

220 Q. Now how would the car, assuming that it was taken by this local, how would the car have got from Lake to Michigan City?

A. It would have gone on the main line local.

Q. And what time would the main line local have got it to Michigan City?

A. 5.30.

Q. What would have been the character of the train handling that car between Joliet and Michigan City as to being through trains or local trains?

A. Well, this would have been a local train all the way through, that is that time of course we would have been unable to tell anything about it.

Q. Now as a matter of the ordinary course of business of your road at that time would a car load of horses have been handled by your local train out of Joliet on the morning of January 25th?

A. No sir.

Q. I mean a car load of horses tendered to you by a connecting line such as the Alton Railroad?

A. No sir, in that case they would have been referred to our evening train or else taken in Chicago.

Q. How would they have been taken in Chicago?

A. Well, by the Alton Railroad.

Q. Look at your train sheet and find if there was an extra train out of Joliet during January 25th which could under the rules and regulations and general course of business of your road, have taken a car load of stock from Joliet to connect with the fast horse special?

A. No sir, the train that left Joliet at 6.30 P. M. was the first train that we had out of Joliet after 6.00 in the morning.

Q. Then what movement was the fastest and best movement possible for a car load of horses out of Joliet to catch the fast horse train?

221 A. Well, the best movement and the only movement we could have made would be to run the car of horses alone, it would have been the only thing, which would not have been done.

Q. I mean by your regular or extra trains you might have?

A. Well we could not have made the connection on account of our train not leaving Joliet until 6.30 P. M.

Q. Was it possible on that day taking into consideration the time that your fast train your through freight left Joliet on that day to get the car load of horses onto the fast horse special which left Chicago that afternoon at 4.00 o'clock?

A. It was not possible, they could not have done it.

Q. What was the next best train on your line for the east on which those horses could go, the best movement you could give?

A. Well, the best movement was in the Symbol train carrying beef and provisions that left Michigan City at 2.45 A. M.

Q. Are you able to tell from your train sheets there whether this car load of horses got on that train or not?

A. Yes sir I am.

Q. This car load of horses was in Arms Palace Horse Car number what?

A. I could not give you the number Mr. Patton, I don't know anything about that.

Q. Is there any way you have of identifying and telling whether this car load of horses—

A. I have a way of identifying, there was one car of horses went out on this train at 2.45 from Michigan City, arriving there at 1.25.

Q. Can you tell from where that car load of horses came to Michigan City?

A. That is not positive, going on the supposition it came off this train from Joliet, the sheet shows no other car of horses coming into Michigan City previous to this one from Joliet.

222 Q. Now follow the train out of Joliet which took this car load of horses, following the train and find if any other car load of horses were picked up by that train between Joliet and Michigan City?

A. No sir there was not.

Q. And was there a car load of horses picked up at Michigan City coming on that train.

A. Well, as I stated before, I suppose it was this same car, this sheet shows no other car of horses coming in but this one car going out, consequently it would indicate it came in on this train that had a car of horses in.

Q. What do you say about that movement being the best movement possible under the circumstances or not?

A. It was the best movement we could give them.

Q. Was there any way in the regular course of business on your railroad on the 25th day of January 1906 where by a car load of horses delivered to your company on the morning of January 25th could have been attached to the fast horse train out of Chicago that afternoon?

A. There was no possible way unless as I stated before it had got into Joliet previous to the leaving time of the regular number 146 and we had been willing to accept that car on the local which we would not have done.

Q. As far as the regular train movement and regular course of business is concerned would that local have handled that car?

Objected to by plaintiff, we think this had been milked dry, gone over at least three times.

Q. If you think so we withdraw the question, if we have made the proof.

Witness on cross examination in answer to interrogatories propounded by James M. Graham, Esq., testified as follows to-wit:

Q. Mr. Stoeckle, when you say your road would not have accepted the car load of stock at Joliet you mean under the ordinary rules in operation at that time.

223 A. Yes sir.

Q. Of course if a superior officer ordered it it would be done?

A. Of course that would have been arranged for previous.

Q. I say if a superior officer having authority in the matter ordered it done it would be done?

A. Certainly.

Q. Railroad rules are subject to such modifications as that always?

A. Yes sir.

Q. And they are often quite often modified in that way?

A. Of course it depends a good deal on circumstances.

Q. It has to be so?

A. Certainly.

Q. Now how far did you say it was from Lake to Michigan City?

A. Nineteen miles.

Q. Lake is getting to be and was at that time quite a town in a railroad sense?

A. O no, nothing more than small yards there and nothing more than the Joliet cut off branched off from the main line.

Q. You keep an engine there?

A. Well, we did not at that time.

Q. It has one come from some other point to do the work?

A. The local freight train done the work there at that time.

Q. Nineteen miles?

A. Nineteen, yes sir.

Q. Now from 11.00 o'clock, or by the way what time did the horse special reach Michigan City?

A. 8.20 P. M.

Q. That evening?

A. Yes sir.

Q. From 11.00 o'clock A. M. to 8.20 P. M. how many trains, freight trains of any class passed eastward from Lake to Michigan City?

A. From 11.20 A. M.?

A. From 11.00 A. M. to 8.20 P. M.

224 A. Well, there was five not including the horse train that passed Lake before 8.20 P. M.

Q. When was the train before 11.00, what was the next one before 11.00 o'clock?

A. A. M.?

Q. Yes, that passed in that direction?

A. One at 10.59 left Lake.

Q. So this local arrived at Lake at 10.45 didn't it according to your schedule?

A. 10.45 yes sir.

Q. From the time it arrived at Lake until the horse special ar-

rived at Michigan City six other trains passed from Lake to Michigan City?

A. Six freight trains yes sir that is right.

Mr. PATTON: How many of those six freight trains that passed Lake after the arrival of the local would stop to do business at Lake?

A. Well, there wasn't any only the one main line local.

Q. What opportunity if any was there fore a car arriving at Lake on the local to get to Michigan City?

A. Well, we had one train that left Lake at 10.59 arriving there at 10.45 probably stopped there half an hour, that is the only train.

Mr. GRAHAM: What time did it reach Michigan City?

A. 11.55 A. M.

Q. Near 12.00?

A. Yes sir.

Q. There was no physical reason why any one of those trains could not stop at Lake?

A. Oh, no.

Q. If ordered to do it it could do so?

A. Certainly.

W. D. MOHR being first duly sworn in answer to interrogatories pronounced by W. L. Patton, Esq., testified as follows to-wit:

225 Q. What is your name?

A. W. D. Mohr.

Q. Where do you live?

A. Joilet, Illinois.

Q. What is your business?

A. Agent to the Michigan Central Railroad.

Q. What was your business in January, 1906?

A. Agent.

Q. Now when you say agent for the Michigan Central Railroad as the agent what does your duties cover at that point?

A. I have jurisdiction over the men employed at that station and in the handling of all business for the company at that point.

Q. Directing your attention to the Kirby shipment you remember the occasion of that Kirby shipment?

A. Yes sir.

Q. What was the first notice that the Michigan Central Company had of the delivery of that car on its rails by the Chicago & Alton Railroad Company?

A. The receipt of the car by the yard clerk.

Q. Have you that receipt with you?

A. The receipt is here yes sir.

Q. Is this receipt one of the original records and files of your office or one of the official documents of your office?

A. This is not our record of the delivery of the car to the Michigan Central.

Q. Is there a record on that slip made by some agent of the Michigan Central?

A. That is made by the Chicago & Alton agent acknowledging delivery of the car.

Q. Is there anything on that slip made by any agent of the Michigan Central?

A. Yes sir, receipt acknowledging that delivery.

Q. Now this is a file in your office is it showing that fact or is it not?

226 A. Yes sir it is.

Q. By whom is that receipt signed?

A. By my car accountant.

Q. Do you know the signature?

A. I do.

Q. Is that his correct and proper signature?

A. Yes sir.

Q. Just tell the jury the method of car interchange at Joliet so they may understand how you do it, assuming a car now to be delivered by the C. & A. Railroad to the Michigan Central what do they do?

A. Well, the Michigan Central have a set track for the delivery of cars from the Chicago & Alton to the Michigan Central Railroad, when the Chicago & Alton set any cars on this track that constitutes a delivery to the Michigan Central Railroad.

Q. Is that true in the course of business between you?

A. Yes sir.

Q. Now what is done by the Chicago & Alton upon putting a car on what you call the set track is it?

A. Yes sir.

Q. With reference to taking a receipt, anything of that kind?

A. There is nothing done at the time the car is set on the track.

Q. What is there done afterwards?

A. The yard clerk takes the number, initial and full record of the seals or whatever it might be of the car and makes a report of it in the office.

Q. In which office?

A. The Michigan Central office, when that is done each day the car accountant makes up a report on a form of this kind and sends it in duplicate to the Chicago & Alton, which is checked up

227 by them and if found correct they receipt it retaining one for their file and returning the other for our receipt.

Q. What is that paper you hold in your hand the evidence of?

A. That is the record that is made up by the Chicago & Alton advising the delivery of that car to the Michigan Central and our acceptance of that delivery.

Q. How soon after the setting in of the car in the ordinary course of business is the checking done by the yard clerk?

A. As a general rule it is half an hour.

Objected to by plaintiff, we think that ought to be limited to this case.

Q. I just want to show the ordinary course of business first.

Mr. GRAHAM: The general course of business is misleading I think as applicable to this particular case.

The COURT: If for the purpose of laying the foundation for some memorandum this man did not make in the course of business, for that it *is* competent, as an independent proposition itself it is incompetent, I assume from the fact this man stated that this seemed to him, you are trying to lay the foundation for some writing he has got there in due course of business, for that purpose it is competent.

Q. Now how did that paper come to your office?

A. By messenger.

Q. From where?

A. The Chicago & Alton Railroad.

Q. And did it come just singly or in duplicate?

A. In duplicate.

Q. What was done by your yard clerk with reference to making any marks on these two papers?

A. It is not done by the yard clerk, it is by the car accountant who checked them up and sees the deliveries are O. K. and if they are he signs one and returns it to the Chicago & Alton and keeps the other for our own record.

228 Now we offer this paper as an Exhibit to the testimony of Mr. Mohr showing when the car was actually delivered to the set track of the Michigan Central Railroad Company. The same being marked Exhibit "G" and made a part hereof as follows to-wit:

Ex. "G."

Form 127, 25 M 1-05.

Interchange Slip for Cars Delivered by The Chicago & Alton Railway Company.

To Mich. Cent.

At 6.40 A. M.

(Give hour A. M. or p. m.)

Engine No. —.

P. RANDOLPH.

(Name of employé in charge of delivery.)

JOLIET STATION, January 25, 1906.

x loaded — empty.

Initials.	End of car.	Number.	x —	Check.
A P N C		6082	x	✓ 1 2 3 4 5

Certified Correct.

W. W. BURNETT, D., C. & A. Ry.

Certified Correct.

W. D. MOHR, R.

Instructions.

One report and its carbon copy to be made for each cut of cars delivered to a connecting road.

Deliveries to different lines not to be included on same slip.

The report and its copy to be made before leaving the yards of this company and signed by its proper representative leaving vacant the time of delivery which will be filled in on reaching the delivery tracks of the connecting road and the signature of the representative authorized to sign for that road obtained to the duplicate slips one of which will be left with the connecting road and the other returned to the agent of the C. & A. Ry.

Show whether cars are loaded or empty using x for loaded and — for empty.

These slips must be preserved for production as evidence
229 if accuracy should be subsequently disputed.

Q. Now what was the first actual notice that you personally had of the delivery of this car by the Chicago & Alton to the Michigan Central?

A. The receipt of the bill.

Q. About what time in the morning was that?

A. About ten o'clock.

Q. Was it before or after you had an interview with Mr. Kirby?

A. Well, it was following the interview.

A. The slip came in then?

A. I believe it was at that time.

Q. Now this car having been delivered at 6.40 A. M. January 25, 1906, what was the first train out on your line which could take that car on its way towards New York?

A. It was our evening freight due to leave at 5.15 P. M.

Q. Was that a through freight or local freight?

A. Through freight.

Q. Assuming Mr. Mohr, you had a morning train I believe, freight train?

A. Yes sir.

Q. What was the character of that morning freight train?

A. A strictly local train.

Q. Running from what point to what point?

A. Joliet to Lake station.

Q. What was the character of work done by that train?

A. They done all the switch work at all stations between those two points.

Q. When you say doing switch work, what kind of car movement?

A. Well, setting cars into the elevator pulling cars out making deliveries and connections if any cars from that connections, and setting cars in to industries.

Q. In the ordinary course of business of that train were there few or many stops between Joliet and Lake?

A. Yes sir many stops.

Q. Now what was the departing time of that train on January 25, 1906?

230 A. I think it was 6.00 A. M.

Q. Assuming that this car of stock of Mr. Kirby's had arrived at Joliet say at 5.00 o'clock in the morning prior to the departing time of this local freight what difference in the movement of that car of stock would there have been from what actually took place?

A. I don't think that the car would have got out any sooner.

Q. Just tell the jury why?

A. The matter would have been taken up with the train master at Michigan City whether he would have accepted that car for the local train or not.

Q. Well, what was the general order or rule if there was a general order or rule about the acceptance of high class freight on that local train?

A. The instructions to the night yard master who handled that and also to the day yard master in case he should work that no fast freight should be put on onto the local train without instructions from the train master at Michigan City or superior of his.

Q. That train master was Mr. Brown who testified here in this case?

A. Yes sir.

Q. As a matter of fact what was the movement given to this car?

A. Well, it was forwarded east from Joliet on the first train, freight train, after its arrival on our rails.

Q. Now how about the course of business there with reference to accepting or not accepting cars of horses or other stock for transportation to connect with the fast horse special, what was your course of business about that?

A. Well, it varies a good deal of course in case we receive a car of horses that wishes to make the horse special we at once on receipt of that car take it up with the officials and see if something can be

231 Q. And the effect of your effort depends on the will of the officials does it or something else?

A. Yes sir partly and partly on having cars to handle, enough there to warrant the moving of the train.

Q. Well how about receiving cars of high class stock or high class freight of any kind for shipment to the fast horse special on this local that you speak of?

A. It is not the policy to move cars on that train for this horse special.

Q. Had it or not been done at times?

A. I don't recollect of it ever being done.

Q. Do you know Mr. Mohr as agent of the Michigan Central at Joliet and from your own knowledge of the Alton connections what the proper movement of a car of stock from Springfield to New York by the Horse Special would be, if so tell the jury what it would be?

A. Well the proper movement would have been via Chicago.

Q. You say via Chicago, what part of Chicago?

A. The Chicago Stock Yard.

Q. Was there any other movement in the ordinary course of business which was reasonably certain to get to the fast horse train?

A. No sir.

Q. What would be necessary for the movement of a car of stock over the rails of the Alton and to your connection at Joliet in order to get that car of stock handled by the local for the purpose of trying to catch the fast horse special at Michigan City?

A. Well, the only thing would be necessary would be to get authority from the train master.

Q. And in the absence of that authority from the train master what could you personally do about it?

A. Nothing.

232 Q. What in addition, if anything in addition to the orders of your superior officer in regard to attaching a car load of horses onto that local, what else would you require?

A. There is really nothing else other than the instructions contained in that order.

Q. And what if anything would you require from the shipper?

A. Well the probabilities are that the train master would advise me that we might accept the car with the understanding that the shipper would be responsible for any damage done to horses while on that train.

Q. Something has been said about the billing of those horses from Joliet to New York City or some place else, New York I believe, what was the necessity or the occasion of the rebilling of those horses?

A. The billing of the Chicago & Alton was simply to Joliet which made it necessary for us to rebill from Joliet to New York City.

Q. Well, what is the course of business with respect to such billing, is that or is it not the usual ordinary course of billing?

A. Yes sir.

Q. Just explain the method railroads bill their stuff starting say in Springfield for a shipment of horses to go to New York where would the Alton bill to?

A. The Alton would bill to their connection or junction, in this case Joliet, and when the bill was received at Joliet they would make a transfer to the Michigan Central, give full instructions on this transfer for the billing of the car where it was to go, weights, rates and so on, and on receipt of that we would rebill that car through to New York City.

Q. Have you a copy or original of that transfer made by the Alton?

A. We have the original on file I believe.

Q. Well is this expense bill is that the same thing?

A. That is the transfer, what we consider a transfer.

233 Q. Is this the document you got from the Alton with reference to those horses?

A. That is the original, except this part here.

Q. Let us use this instead of the original so Mr. Mohr can have the original to take back with him.

Mr. SALZENSTEIN: One thing is changed here.

Mr. PATTON: Well that is a memorandum made; now it is agreed that Mr. Salzenstein's copy of the expense bill may be used instead of the original in order that Mr. Mohr may take the original back.

Q. Now what is that Mr. Mohr, Exhibit "H"?

A. That is the transfer billing of this car from the Chicago & Alton to the Michigan Central.

Q. Now in the course of business what is the office and purpose of that transfer as you call it?

A. To give us instructions where to send the car.

Q. And what about the freight already earned, what does that bill show as to freight already earned?

A. Well it shows there is due to the Chicago & Alton \$70.50.

Q. What is the basis of the charge?

A. That is their portion of the earnings of this car Springfield to New York.

Q. Now there is an item in that expense bill of \$40.60 I think?

A. Yes sir.

Q. Tell the jury what that is?

A. That is the rental for the use of the car.

Q. What if anything has the railroad company to do with that car, does it own it?

A. No sir.

Q. By whom is that car owned if you know?

A. It is owned by the Arms Palace Horse Car Company.

Q. Now when a shipper wants an Arms Palace Horse Car—

234 Mr. SALZENSTEIN: That has been all gone over.

Q. I know, but if there is to be any controversy about it I want to make sufficiency of proof, I don't want to take up time if there is to be no controversy about that question. Q. What has the railroad company to do with regard to the rental of that car?

A. Well, the only thing is the railroad companies are held responsible.

Q. To whom?

A. To the owner of the car.

Q. And what does the shipper do, what does the railroad company do with reference to the shipper?

A. Well, it is customary that the railroad company order the car for him.

Q. And about collecting from the shipper?

A. The railroad company?

A. Yes.

Q. Well, they collect the charges off the shipper or bill it forward with the shipment.

Q. And what is done at either the initial point or terminal point, if it is paid in advance what does the agent at the initial point of shipment do with this rental?

A. He takes it into his station account.

Q. Does he remit it to the railroad company or car company?

A. To the railroad company.

Objected to by plaintiff as encumbering the record with this sort of stuff, this whole examination with regard to what becomes of the money for the rental of the Palace car is immaterial to the issues in this case.

The COURT: What is the purpose of it?

A. The purpose of, this freight bill as charged by the declaration is a bill of \$170.60 and I desire to separate the actual freight bill from the car rental which is a separate item and which goes 235 to the car company and with which the railroad company has nothing to do except as collecting agent, in other words the actual rate on this car load of stock from Springfield to New York was \$130.00, there is an item of \$40.60 without explanation would appear was an addition to the freight charge—it is to show the tariff collected was the official tariff.

The COURT: All right, it can go in, it is better in than out.

Q. Now to whom does the railroad company account, finally account if any body for that revenue?

A. That is done in the Auditor's office, the local agent don't know.

Q. But if you know who finally gets the money, does the railroad company keep it or the Palace Car Company?

A. I would judge the Arms Palace Car Company would.

Objected to by plaintiff unless he knows.

Freight Bill.

Copy of Way Bill, April 13, 1907.

Consignee, Fasig, Tipton & Co.

JOL. STATION, 1/25/1906.

Destination, New York City, N. Y., via M. C.

To the Chicago & Alton R. R. Co., Dr.

Pro. 2470.

For Charges on Articles Way Billed from Springfield via —.

Date of waybill,

Articles and marks.

1/25/1906.

Car initials and number,

This bill must be made with ink or indelible pencil.

6082 A. P. & Co.

14 horses.

Consignor,

Loaded at 4 P. M. Jan. 24, '06.

N. T. Kirby.

Pass N. T. Kirby in charge. In

Connecting line reference

care fast horse train out of Ch'go on M. C. Ry. about 3 P. M. Thursday, Jan. 25.

Original car,

Original waybill number

Original point of shipment

Weight.

Rate.

Freight.

Advances, rental.

20000

1495

2990

/65

40.60

Received payment.

M. C. STARNES.

M. C. R. R. Received Jan. 2, '06. Total to collect..... 70.50
Joliet, Ill.

Copy.

All carloads shall be subject to a minimum charge for trackage and rental of \$1.00 per car for each 24 hours detention or fractional part thereof after the expiration of 48 hours from arrival at destination.

Original paid freight bills should accompany all claims for overcharge, loss or damage.

Filed Feb. 7, 1908.

S. S. JONES, *Clerk.*

Ex. 4.

236 A. Well I don't know.
Q. Well on the expense bill that I have shown you what are the items of actual freight, how much?

A. \$29.90.

Q. From where to where?

A. Springfield to Joliet.

Q. What does that expense bill show with reference to the character of the shipment, what was shipped?

A. Why, fourteen horses.

Q. And at what weight?

A. 20,000 pounds.

Q. And at what rate?

A. A sixty five cent rate Springfield to New York.

Q. A sixty five cent rate, what does that mean, for one pound, ten pounds a hundred pounds or a car load or what?

A. A hundred pounds.

Q. This rebilling that you speak of at Joliet was done by whom?

A. My bill clerk.

Q. And on what authority from the Alton road?

A. This transfer.

Q. Now we offer this copy of the transfer in connection with the testimony of Mr. Mohr.

Q. Now as to the billing from Joliet to New York was there information given by the Alton railroad other than on this expense bill?

A. No sir.

Q. If it turns out that the billing from Joliet to New York was 130th street what if anything did the Alton Railroad have to do with that billing?

Objected to by plaintiff, that would be question of law rather than fact.

The COURT: He may answer that if he is able to.

A. Nothing.

237 Witness on cross-examination in answer to interrogatories propounded by James M. Graham, Esq., testified as follows, to-wit:

Q. You mean by that no agent of the Chicago & Alton had anything to do with it actually?

A. With the delivery?

Q. With the billing, the question which you just answered for Mr. Patton, what did you understand it to be, you answered it had nothing to do with —?

A. With regard to the delivery at 130 street?

Q. And by that you mean that no agent of the Chicago & Alton was present or did anything towards the making of the bill?

A. The Chicago & Alton made the bill, the transfer.

Q. The one marked Exhibit "II," the Alton made that one?

A. Yes sir.

Q. Mr. Mohr, will you read the words that are stamped on there, I take it they are stamped on with a rubber stamp, what are those words?

A. M. C. R. R. rec'd Jan. 25, 1906, Johet, Ill.

Q. With that exception that is just like an ordinary way bill is it not?

A. No sir.

Q. What is the difference?

A. This is nothing but a transfer no car could move from one station on that.

Q. In what respect does it differ from the way bill, just point out to us what the differences are that we may know.

A. The only difference is that that is a form that is authority for moving a car from one station to another, while this is just a bill to the consignee or a transfer to the connecting line.

Q. But apart from the authorized issue and apart from the arrangement of the lines and all that, apart from the form what difference is there in it and the way bill?

A. Just as I said you could not move a car on this.

238 Q. I am not asking you what could be done on it, I am asking from the appearance of it, the way and matter written in it what difference if any is there in it and the way bill?

A. In the form.

Q. Only in the form?

A. Yes sir.

Q. The substance is the same?

A. Yes sir.

Q. What is the reason, or how did you come to give this receipt?

A. These transfers are delivered to us in duplicate, and in all shipments which are billed east by us the original is kept for our files and the duplicate is returned to the Chicago & Alton with the date to show what day's business that would be, the charges to that man.

Q. Mr. Mohr you and Mr. Kirby were talking about this shipment in your office when the word, when the notice, the formal notice came to you that the car had arrived?

A. You mean the notice of transfer?

A. Yes?

Q. Yes, we were talking together at the time.

Q. You heard from Mr. Kirby about the car being there before this transfer reached you?

A. Yes sir.

Q. I believe you mentioned at that time and in that connection that the receipt of that paper at that time was the first official notice you had that the car was in the yard?

A. That I personally had, yes sir.

Q. You were the person who was in authority there you say?

A. Yes sir.

Q. You didn't get to the office until what hour?

A. Why I should judge 8 or 8.30.

Q. You had no notice of any sort from the Chicago & Alton that the car had been shipped or was about to arrive?

239 A. None that I seen no sir.

Q. Well you know?

A. No sir.

Q. You got none?

A. No, I got none.

Q. None reached you?

A. No sir.

Q. And in the usual course of business such a notice would come to you in your office, through your office?

A. It would come through the office, yes sir.

Q. You say that it is not at all unusual to have shipments of this sort sent to connect with the horse special?

A. I didn't catch the question?

A. I understood you to say it was not anything unusual that it was sometimes your arrangements were made so as to send car loads of horses from Joliet to connect with the horse special?

A. Yes sir.

Q. On those occasions you stated to Mr. Patton as I remember that the doing of that depended on a couple of things, one of which was the order from the superior officer, what was the other?

A. The other was by having a crew, that is an engine and crew and conductor and sufficient freight to move a train from Joliet to Michigan City.

Q. How far is it from Joliet to Lake?

A. 45 miles.

Q. And to Michigan City?

A. It is 67 miles.

Q. Of course when you speak of the crew of the train leaving that morning at a certain hour I assume you do not speak from personal knowledge?

A. From the records.

Q. Who makes the record?

A. Why two parties, the yard clerk when he takes the train out and by the conductor registering the time that he leaves Joliet.

Q. Both those records agree as to the time leaving time or do they not?

240 A. Yes sir.

Q. They could make such entry as they chose in that record?

A. Well.

Q. It happens occasionally that they do record the wrong time as the leaving time?

A. Oh, yes, may be a few minutes possibly.

Q. There would be many reasons for it?

A. Few minutes possibly.

Q. Car load shipments of horses sometimes went that way to avoid going into the Chicago yards don't they?

A. Yes sir.

Q. And that is not infrequent?

A. Not very frequent.

Q. But it has happened more than one or two or three times?

A. It has.

Q. When you answered Mr. Patton that in the ordinary course of business, or in the ordinary and proper movement of cars they would go by way of the Union Stock Yards in Chicago of course you have in mind the exception to that rule, that that was not an iron clad or invariable rule?

A. No.

Q. You mean that was the way it was generally done, that business is not solicited by the Joliet gate way for the horse special, and that is what you mean by your answer?

A. Yes sir.

Q. How many persons were there who could order a departure from the ordinary course of business in that regard?

A. Well, there would be two superior officers that I could take the matter up with to move it.

Q. Did you have any discretion in any case?

A. No sir.

241 Q. You could refer the matter to the train master or the division superintendent or the general superintendent?

A. I have no right to go over the division superintendent.

Q. That is true, he would be slighted and might resent it?

A. He might.

Q. But the division superintendent at least might prefer it to the general superintendent if he chose?

A. Yes sir.

Q. If the general superintendent gave you the order you of course would obey it without asking from anyone else?

A. Yes I would notify the train master of such order.

Q. But it would merely be a notification so it would not conflict with his other orders and not by way of getting his consent?

A. Oh, no.

Q. But when the car was received by the Alton at Springfield at say 4.00 o'clock the evening before, if you had been notified of it and notified of the fact that it was intended to catch the horse special

at Michigan City or some point on the main line you could take the matter up with the train master or with the proper officer above you whoever he was and at least try to make the necessary arrangements?

A. Certainly.

Q. So that it could be transferred in time for the horse special the next day?

A. I would.

Q. As a matter of fact have you any knowledge of the number of steps the local made that day from Joliet to Lake?

A. No sir.

Q. You don't know about that?

A. No sir.

Q. The fact is Mr. Mohr that there are only about two points of any consequence on that run, Mateson is about the only town is it not, of any consequence?

242 A. Chicago Heights.

Q. Is that supposed to be worth noticing?

A. I would certainly think so.

Q. Well, those two in that 45 miles run or in the 67 miles run are about the only ones of any consequence?

A. No, three.

Q. What is the other?

A. Lake station and Jefferson, that is the connection with the main line.

Q. Liverpool at the crossing of the Fort Wayne don't amount to anything?

A. It amounts to some but not a great deal.

Q. Is there a town there?

A. No a crossing is all there is.

Q. Sand and such?

A. Yes a lot of sand.

Q. You did make some effort after Mr. Kirby talked to you to get the car moved away for the horse special?

A. Yes sir.

Q. You made I believe some effort to have attached to the passenger train?

A. I did.

Q. But because it was not provided with piping to convey the heat from the engine back of it you could not make that arrangement?

A. I don't remember as to that part of it.

Q. You failed to do it anyhow?

A. I failed to get the car on that train.

Q. I believe you also tried to get a single engine to take it over but failed in that also?

A. Yes sir.

Q. There was but the one yard engine there and that could not be spared.

243 A. That is right.

Q. So it waited until the 5.00 o'clock train?

A. Yes sir.

Q. As a matter of fact Mr. Mohr if you had received notice before

leaving the office the evening before you could have provided for a transfer of this car to the other road couldn't you?

A. That would be up to the train master, I would have notified him the night before on the car coming.

Q. Well that has frequently happened down on that line?

A. Oh, yes.

Mr. PATTON: Now Mr. Mohr in reference to this question of getting a car over to the fast horse special would such procedure as has been suggested by Mr. Graham, appealing to the train master or division superintendent or whoever you might have to appeal to be the regular ordinary course of business, or would it be a special arrangement?

A. Well it depends on the amount of freight we have, the amount of freight and number of cars we have in the yard.

Q. No, I mean would it be the regular ordinary course of shipment of stock or would it be by a special arrangement made for that particular car load of stock?

A. Well it would have been a special arrangement.

Q. Could this car of stock have been handled by the local freight even if you had had notice the night before and had it arrived in time for the local freight without a special arrangement?

Objected to by plaintiff as leading.

Q. What would have been necessary in the way of what you would have to do in case you had received notice of this car of stock the night before and of the desire to get it to the fast horse train, in order to get it onto the local there to be carried over?

244 A. Had we received notice the night previous, we would have notified both the division superintendent and the train master, and he would probably have given us orders what to do whether to move it on the local or hold it or run an extra train.

Q. Could that have been, would the movement of such a car on that local have been the regular routing of such a car or would it have been a special routing?

A. Special.

Mr. GRAHAM: It would be special routing under what you frequently do.

A. Well yes.

C. A. BYERS being first duly sworn in answer to interrogatories propounded by William L. Patton Esq. testified as follows, to-wit:

Q. What is your name?

A. C. A. Byers.

Q. Where do you live?

A. Springfield.

Q. What is your business?

A. Clerk.

Q. For whom?

A. At the present time?

A. Yes?

Q. The Black Diamond Coal Company.

Q. Are you connected in any way with the Alton Road now?

A. No sir.

Q. Where were you employed in January, 1906?

A. In the C. & A. freight office.

Q. What was your capacity?

A. Clerk.

Q. Were you on night duty or day duty at that time say the 24th of January, 1906?

A. I started to work at 7.00 o'clock and got through generally about 8.00.

245 —. You started to work at 7.00 o'clock in the morning or in the night?

A. In the morning.

Q. And quit at what time?

A. When I would get through, generally 8.00 o'clock.

Q. Directing your attention to a shipment of horses made by Mr. Kirby I will ask you what if anything you had to do with the billing of those horses?

A. I had the billing to do.

Q. What if anything did you have to do with reference to the live stock contract?

A. I had to fill it out and have it signed.

Q. Now I show you what is called the live stock contract, being executed in duplicate as being marked Exhibit "C" and Exhibit "A," and I will ask you if you have ever seen that before?

A. Yes sir.

Q. In whose handwriting are the insertions in the blank?

A. Mine.

Q. By whom is it signed, who signed the name W. P. Eggelston, B.?

A. I did.

Q. Who signed the name N. I. Kirby?

A. Mr. Kirby.

Q. Now I will ask you Byers whether those two papers were written at separate times or whether they were written together with a manifold sheet?

A. A carbon.

Q. When you say carbon that means a manifold sheet?

A. Yes sir.

Q. In doing that how do you do, do you write Joliet for example twice or do you write it once?

A. Just once.

246 Q. When you signed W. P. Eggelston by B did you sign it twice or—

A. One.

Q. When Mr. Kirby signed his name did he use the pencil twice or once?

A. Only once.

Q. Do you remember the occasion of Mr. Kirby coming to the window there and signing this contract?

A. Yes sir.

Q. Now when he came there did you have that live stock contract filled out or not?

A. It wasn't complete.

Q. What was necessary for you to do after he came to the window?

A. Punch his description and find out how many head of horses he had and who was to go on charge of the car.

Q. What other things then was there done by you after Mr. Kirby came to the window besides having him sign his name?

A. I completed the contract.

Q. From whom did you get the information to complete the contract as to the number of horses and who should accompany the car?

A. From Mr. Kirby.

Q. Did you tell him what you wanted that information for?

A. No, I don't believe I did, I can't remember things like that far back, for we make the contracts every day.

Q. Can you remember whether this contract was handed to Mr. Kirby extended out in this way to sign, or whether it was folded up so he could not see what it was?

A. It was out flat with a carbon sheet between.

Q. Is it true that when Mr. Kirby signed this contract it was folded up so as to conceal a part of the contract?

A. No sir.

(Here follows Live Stock Contracts, marked pages 247 and 248.)

AGENTS WILL MAKE AGREEMENT IN DUPLICATE, GIVING DUPLICATE TO SHIPPER, AND FORWARD ORIGINAL TO AUDIT OFFICE WITH DAILY ABSTRACT.

ANIMALS EXCEEDING IN VALUE \$500 PER HEAD WILL BE TAKEN ONLY BY SPECIAL ARRANGEMENT.

THE CHICAGO & ALTON RAILROAD COMPANY.

LIVE STOCK CONTRACT.

AGENTS WILL PERMIT ONLY THE NAMES OF THE OWNERS OR bona fide EMPLOYEES, WHO ACCOMPANY THE STOCK, TO BE ENTERED ON THE BACK OF THIS CONTRACT WITHOUT REGARD TO PASSES ALLOWED BY NUMBER OF CARS.

This contract, when executed in duplicate by owner or the authorized representatives of owner in charge, and signed by Agent, will entitle such person or persons to take on said train with stock to care for same, but will not entitle holder of contract to take on any other train, nor will contract be accepted for passage on any other line.

When freight train must punch contract, when presented for transportation, in all cases, the personal description of animals of identification, the agent issuing this contract will indicate with L punch marks in column 1 in the marginal space shown hereon, the personal description of animal, up to, charge of the Live Stock covered by this contract. Should contract carry more than one attendant in charge, Agents will punch description in additional columns 2 and 3, each being taken to have description coincide with parties whose names appear on back of contract.

NO. OF WAY-BILL	NO. AND INITIAL OF CAR	NO. AND KIND OF ANIMALS IN EACH CAR	NO. OF WAY-BILL	NO. AND INITIAL OF CAR	NO. AND KIND OF ANIMALS IN EACH CAR	DESCRIPTION OF ATTENDANT	
						1	2
1925	ARMS	14			Horses	Slim	★
						Medium	★
						Short	★
						Tall	★
						Light	★
						Gray	★
						Dark	★
						Red	★
						Bay	★
						Black	★
						White	★
						Other	★
						Side	★
						Full Head	★
						None	★

EXECUTED IN DUPLICATE AT Springfield Ill STATION. Jan. 24 1906

THIS AGREEMENT, MADE BY AND BETWEEN THE CHICAGO & ALTON RAILROAD COMPANY,

PARTY OF THE FIRST PART, AND N. T. Kirby PARTY

OF THE SECOND PART, FOR THE CONSIDERATIONS AND MUTUAL AGREEMENTS AND CONDITIONS HEREIN CONTAINED, THE PARTY OF THE FIRST PART WILL TRANSPORT FOR THE PARTY

OF THE SECOND PART THE LIVE STOCK DESCRIBED BELOW:

Cars, said to contain, 14 head of Horses

Springfield Ill Joliet

Car, said to contain.....	14head of.....Horseleg
Springfield Ill		Joliet

at the rate of 1 1/2 cent per car and not being less than the rate charged for the transportation of such cattle at carrier's risk or when the valuation is declared to be greater than that given below, subject, nevertheless, to the following terms and conditions:

[illegible]

Each Cow.....	Each Sheep or Goat.....	\$10.00
Each Horse of any Grade, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833		

Each.....	100.00
Value, \$.....	100.00

Each..... Value, \$.....

THIRD. The second party agrees that two first party and all connecting carriers is exempt and released from all liability, loss or damage arising out of any injury to and on the while in transit, except such injury as said cattle may receive through the willful or wanton negligence of the first party.

FOURTH. The second party agrees to and does hereby assume all risk and expense of loading, unloading, feeding, watering, bedding and otherwise caring for the live stock covered by this contract while in cars, on piers, or elsewhere in the possession of the first party or connecting carriers, and further agrees that if in

that it shall be necessary to load or unload all or part of the stock covered hereby, the same shall be done by and at the expense and risk of the party of the second part. It is expressly agreed that delivery of said stock to said party is not complete until the cars containing the stock are attached to the train by which it is to be transported and that the first party shall not be liable for loss or injury to said stock from any cause before the cars containing it are attached to the train by which it is to be carried and the transportation of the stock is begun.

EFF TH. The first party and all connecting carriers shall be and is hereby released from all liability, loss or damage received by the said car arising from or growing out of the transportation of the stock by the said party.

SEVENTH. The second party shall send with the stock upon the run by which it is carried a sufficient number of men, which in no event shall be in excess of

to take care of the stock, which said man or men the first party agrees for itself and connecting carriers, to carry on said train and to return to the place of shipment free of charges; provided, however, that no return transportation shall be given to parties with one car only, except on horses or mules. Said free transportation is given and received as a consideration, nothing into the terms of this contract.

ELC:HTH. The second party further agrees to indemnify and hold the first party and all connecting carriers harmless from all damages arising from any injuries which the employees of the second party may sustain from any cause while they are upon or about the train during the transportation of the stock, or while they are

NINTH. The second party further covenants and agrees that the first party shall, in no event, be liable to the second party for delay or for any injuries of any kind or character, beyond the terminus of the line of the first party, and when the first party shall have delivered said stock to any connecting carrier or carriers, or upon the tracks of any stock yards company or belt company, then all liability of the first party hereunder shall thereupon terminate and cease.

TENTH. As to stock consigned beyond the line of the first party, the first party agrees that the through rate for the transportation of said live stock returning to the place of shipment.

from.....Springfield, Ill.....to destination,
to wit:.....shall not exceed.....1/2

11. ELEVENTH. The second party further agrees that should any loss or damage of any kind occur to the property specified in this contract, the second party shall, within five days after the live stock in question has been unloaded, give notice in writing of his claim to the first party, and in the event of his failure so to do, said second party hereby releases and shall be barred from all claims of any kind or character against said first party arising out of any injury or damage to said stock by said first party. If the property is consigned to or in care of any stock yards or stock yards company, or other live stock market place, then such notice shall be given to the stock yard or stock yards company, and the stock shall have been removed from said stock yard or stock yards company, and the second party shall be barred from all claims of any kind or character against said stock yard or stock yards company. In the event of the failure of said second party or to give such notice, then said second party hereby releases and shall be barred from all claims of any kind or character against said first party or any damage to said stock.

TWELFTH. Said second party hereby releases and waives any and all causes of action or claims for damages that may have accrued to him by reason of any written or verbal representation made to him prior to the execution hereof, and further agrees that all such prior representations and agreements are hereby merged

THIRTEENTH. While waiting his right to recover for damages because of delay in transit said second party agrees that the schedule time on the time card of first party in force at this date, of the train on which this stock may be carried, from place of shipment to the terminal point on this line of said shipment with one-
not of said schedule time against them and not permitting time lost by cause not such, such as fire, strike, or other proper or improper cause, or any delay not of their own making, is a reasonable time for the transportation of said stock under this contract; and if the stock shall be transported within that time the second party agrees not to make any claim for damages from delay in transit, and the first party shall not be liable therefor.

FOURTEENTH. Said second party further releases all claims for damages which may arise by reason of delay in transit and agrees that the live stock herein covered be transported to not to be transported to its destination or to be delivered by any connecting carrier within any specified time, at any particular hour, nor

in capital for any particular market, and the agents of the first party are not authorized to agree so to do, in favor of any particular market. Said second party further agrees that the transportation which may be issued by the first party to the man or men recommending said stock for their return trip shall not be taken used or used by any other person or persons whatsoever, and further agrees that, in the event of a transportation is lost or destroyed by fire, theft or other cause, the first party shall not be liable for the issuance of any substitute transportation to such person or persons, but the person or persons to whom the same may be issued, the first party shall not be liable for the issuance of any substitute transportation to such person or persons.

IN WITNESS WHEREOF, the first party has hereunto affixed its signature, by its duly authorized agent, and the second party has hereunto affixed his hand and

and at Springfield Ill
 this 24 day of July 1906
THE CHICAGO & ALTON RAILROAD COMPANY,

247

BY W F Eggleston, B

(SHIPPER) N T Kirby (SEAL)

THE AGENT MUST HAVE THE OWNER OR OWNERS' SIGNATURE, IF POSSIBLE, IN THEIR ABSENCE, THEIR WELL KNOWN OR AUTHORIZED AGENT OR AGENTS MUST SIGN FOR THE OWNER OR OWNERS.

RELEASE.

In consideration of the free transportation granted me by THE CHICAGO & ALTON RAILROAD COMPANY for the purpose of accompanying the stock shipped on the within contract, and on being permitted to go in, over and about the cars in the train in which said stock is carried, and being furnished return transportation free over said Company's line to the point of shipment, as stipulated by the within contract, we hereby release said Company from all liability to us as to a passenger carried for compensation, assuming for ourselves all the risks of accident, injury, or damage from any cause whatever while upon the trains or premises of said Company in charge of said stock, and while being returned free to the point of shipment as aforesaid.

SIGNED THIS 24 DAY OF JULY 1906

W T Kirby

W P Eggleston

WITNESS.

NOTE.—The Agent must witness the signature to the above release of all parties getting in charge of the stock herein contracted for. If the Agent making return passes or any conductor suspects that the person presenting this contract is not the party who signed above, he will require him to write his name in his presence, and compare the signatures.

Filed Feb 7 1908

S T Jones Clerk

249 Q. Can you remember what if anything was said there by you or by Mr. Kirby with reference to this live stock contract?

A. No, nothing, but I asked him for the information to complete it with.

Q. What objection if any did he make to signing his name to the contract.

A. None.

Q. What inquiry did he make if any as to what he was signing?

A. None.

Q. What opportunity if any did he have before signing it to see what it was?

A. Why, he could have found out anything he asked.

Q. Was there a light there?

A. Yes sir.

Q. Where was the contract when he signed it?

A. Right on the counter in front of him.

Q. What was there to prevent him if anything from reading it?

A. Nothing.

Q. Do you know whether he did read it or not?

A. No sir I do not. (Exhibits A and C offered.)

Witness on cross-examination in answer to interrogatories propounded by James M. Graham, Esq., testified as follows to-wit:

Q. That was in the freight depot there Mr. Byers?

A. Yes sir.

Q. Was your office there fenced off from the corridors where the public generally came?

A. Yes sir.

Q. How?

A. By a window wire grating.

Q. How big a window was it?

A. I would judge about two by four feet I would not be sure.

Q. Was the four feet up and down?

A. Yes sir.

Q. And except that window there was a solid partition between your office and the outside or rotunda?

A. Yes sir, clouded glass.

250 Q. Clear to the ceiling?

A. No sir.

Q. How high?

A. Well then I don't believe it is two thirds of the way up.

Q. Well a good deal higher than a man's head?

A. Yes sir.

Q. But you did business with your customers through this window?

A. Yes sir.

Q. And it was covered by heavy wire screens or partly covered?

A. Partly covered.

Q. How much of it was open, that is how much of it was not covered by wire?

A. Enough to get the telephone out through it, I judge about six inches.

Q. Was that across the whole width of the window?

A. The grating?

A. No, the open space under the wire?

A. Yes sir.

Q. So that the open space would be about six inches to a foot?

A. Yes sir.

Q. And when you had some one on the outside sign a paper you poked it through the hole?

A. Yes sir.

Q. And he stood on the outside?

A. Yes sir.

Q. And the desk there I suppose was about the ordinary height and the window part of it was about how high from the ground?

A. Just handy to stand and work.

Q. So a man could stand there and write?

A. Yes sir.

Q. How much of the table portion was outside the wire, how much space was there where the man was writing was there between the wire and the edge part or whatever it was?

A. I would judge about that wide.

Q. That would be about eight inches?

251 A. Yes sir, I don't know positive.

Q. Well, it is about eight, six or eight.

Q. All that.

Q. And that was in that place that Mr. Kirby signed?

A. Yes sir.

Q. You were on the inside at that time?

A. Yes sir.

Q. You say there were some portion of the contract you were not able to fill until he came and gave you the information?

A. Yes sir.

Q. And part of that information was the number of horses?

A. Yes sir.

Q. And the rest of it something about Mr. Kirby you say you punched, what was that?

A. His description.

Q. How did you punch him through the hole, I suppose by that you mean you punched the blank places describing the complexion, size and age of the fellow who is getting the pass, is that it?

A. Yes sir, whether he was smooth face.

Q. A sort of general description of him?

A. Yes sir.

Q. It was the paper and not the man you punched?

A. Yes sir.

Q. About what time was the way-bill made out by Mr. Byers?

A. I judge between seven and eight, I am not sure.

Q. Do you remember the day?

A. No sir.

Q. Well it was between seven and eight one morning?

A. No it was in the evening after supper.

Q. Was that the evening before the horses left Springfield?

A. The evening the horses left Springfield.

Q. Then that was just about the time they were ready to start?

252 A. I think the train was due at about 8.15.

Q. Did you have anything to do with the making of the way-bill?

A. Yes sir.

Q. Did you make it out?

A. Yes sir.

Q. The original seems now to be lost, do you recognize that?

A. It is not my writing.

Q. Did you make the way bill out in duplicate by carbon?

A. No sir.

Q. Can you now tell whether that is a copy, a correct copy of the original that you made out, the paper I call your attention to now is marked Exhibit "B"?

A. I could not say whether that is a copy of the original or not, part of it looks all right.

Q. I call your attention to the paper marked Exhibit "H," which appears to be a copy of the way bill, did you make that out?

Mr. PATTON: That is not a copy of the way bill, a copy of the expense bill.

Mr. SALZENSTEIN: It was given to me as a copy of the way bill whoever made it had marked it so.

Q. It says on the top of it copy of way bill April 13, 1907?

A. As far as I can see that is a copy.

Q. You mean the paper Exhibit "B" is a copy, is that what you mean is either of them in your hand writing?

A. No sir.

Q. Whose writing are they in?

A. I could not state.

Q. Can you tell whose hand writing either of them is in?

A. No sir.

Q. Well don't you find some things in the one that is not in the other?

A. The only difference I see in the two this notation here is not on the expense bill.

253 Q. What is the notation you find on the way bill, a copy of the way bill on Exhibit "B" you do not find on Exhibit "H"?

A. "R 1 s d value \$100 each," the only difference I see between the two.

Q. Neither of them was made by you?

A. No sir.

Q. I understood you to say or did you say to me as to whether you made a copy of the way bill or not?

A. I made the original way bill.

Q. I mean did you make more than one copy of the sheet?

A. I took a copy of it in the way bill impression book.

Q. Do you know what became of that?

A. The impression book?

Q. Yes, was it there when you left the office?

A. Yes sir.

Q. When was that Mr. Byers?

A. When I left the employ of the C. & A.?

Q. Yes?

A. The 15th of August 1906, that was the August following this transaction.

Q. You were employed doing this kind of writing dealing with shippers from seven in the morning until you got through may be at eight in the evening.

A. Yes sir.

Q. And every day?

A. Yes sir.

Q. And I suppose you were quite busy all the time?

A. I would be especially — time of the evening with coal.

Q. You billed out coal did you?

Q. From how many mines?

A. Thirteen.

Q. Aggregating about how many cars a day?

A. It run from seventy five to one hundred and twenty-five.

Q. Did you have other work to do also?

A. Yes sir.

254 Q. How much other work did you have as compared with the coal business?

A. The coal billing was the largest portion of it.

Q. What per cent of it all would you say the coal billing was?

A. That would be pretty hard for me to tell.

Q. Would it be sixty per cent of your entire work?

A. Yes I think it would.

Q. Would that be about right?

A. I could not say.

Q. Well the short if it is you were quite a busy man?

A. Yes sir.

Q. You took impressions in your copy of every way bill?

A. Yes sir all way bill.

Q. Did you have anything else than way bills?

A. No sir not in the way bill book.

Q. And you worked that way six days a week.

A. Yes sir.

Q. And chored a little at it on the seventh day?

A. Yes sir.

Q. You did business with a great many people while there?

A. Yes sir.

Q. You could not very well Mr. Byers have clear recollections or impressions about any *in* individual circumstance under those circumstances- that far away?

A. No sir.

Q. And you have not?

A. No sir.

W. P. EGGLESTON being first duly sworn *on* answer to interrogatories propounded by William L. Patten, Esq., testified as follows; to wit:

Q. Your name is W. P. Eggleston?

A. Yes sir.

Q. What is your present business?

A. Freight agent of the Chicago & Alton railroad.

A. At what place?

255 A. Springfield, Illinois.

Q. How long have you been freight agent of the Chicago & Alton here?

A. Since February 1st, 1905.

Q. What was your business prior to that time?

A. Chief Clerk;

Q. In the same business?

A. The same.

Q. For the same railroad?

A. Yes sir.

Q. Directing your attention Mr. Eggleston to the shipment of a carload of horses by Mr. Kirby from Springfield to New York and I will ask you what was the first thing that you knew of the transaction?

A. Mr. Kirby came into my office one day as I was going out, and asked me if the live stock agent was in, I told him I didn't know but I would go see, and I went up to Mr. Stuttzman's office the live stock agent, he wasn't in and I come back and told Mr. Kirby and he said he had a car of horses to ship and wanted to see him, and I told him I would have Mr. Stuttzman come over to his place of business as soon as he came in and see him in regard to it, which I did when Mr. Stuttzman came in afterwards, I told him Mr. Kirby had been to see him, and he immediately went over to Mr. Kirby's office.

Q. How soon after that was it that you saw Mr. Kirby again about this matter?

A. I cannot say whether the same day or the day following Mr. Kirby and Stuttzman came in to the office and called me out they was sitting down on a settee in the public part of the office and were talking about this car of horses.

Q. Well now what was said there about the character of the horses if anything by Mr. Kirby or by Mr. Stuttzman?

256 A. The only thing I remember Mr. Kirby said a car of horses he wanted taken to New York for a sale beginning the following Monday, I think it was on a Monday.

Q. What was said as to whether they were fine horses or common horses?

A. I don't recollect anything being said whatever, just a car of horses going to that sale.

Q. Now what was said on that occasion, if anything with reference to the Michigan Central fast horse train and by whom was it said?

A. Mr. Kirby said he wanted the car to go on the Horse Special which left Chicago at 3.30 on Thursday and they would make some arrangements about going by way of Joliet, I says to Mr. Kirby why not go by way of Chicago by taking our train at 8.00 o'clock in the evening we will get you into Chicago the next morning at six or seven and you will have until 3.30 in Chicago, he said I don't want to go through the Union Stock Yards, I want to load the horses here without being unloaded, and would not go through the Union Stock Yard, so then I told him about probably it would be hard to get on the horse special, I told him I thought he would do better if he went by the way of Chicago.

Q. What did he say if anything about any knowledge that he had of the Joliet movement?

A. As I remember he said something about a friend of his had shipped that way had gone by way of Joliet and he knew that it was all right.

Q. Prior to that time had you handled or had you not handled stock out of Springfield to connect with the Michigan Central horse special?

A. No sir, I didn't know there was a fast horse special until that time.

Q. What did you know if anything about the possibility of connecting through Joliet?

A. I didn't know whether or not it could be made.

257 Q. What did you know with reference to the terminals and connections of the Alton railroad with the Michigan Central at Chicago?

A. Well I knew that he would have from possibly six or seven o'clock in the morning until 3.30 to make his connection which would prevent any possibility of any missing of the train.

Q. From whom did you learn of the departure of the horse special from Chicago.

Q. From Mr. Kirby.

Q. What other information did you have in regard to that?

A. None whatever.

Q. What if anything was said there by you or by Mr. Stuttsman in your presence with reference to agreeing or guaranteeing to make the movement by way of Joliet and to connect with the horse special?

A. I don't hear anything guaranteeing the connection would be made.

Q. Well just state what was said what was the talk back and forth about this horse special and the Joliet movement?

A. Well the main thing I remember was that Mr. Kirby insisted he wanted to go by way of Joliet and Mr. Stuttsman wanted him to go by way of Chicago, so did I, but Mr. Kirby said he knew connections could be made, had been made, and he didn't care to go by

way of Chicago, he didn't want his stock to go through the union stock yards.

Q. What was the upshot of the conversation, if any upshot there — of it at that time, with reference to this Joliet movement?

A. Well that he would ship by way of Joliet.

Q. Now was there a rate made to Mr. Kirby for his Springfield New York Shipment?

A. Yes sir.

Q. By whom?

A. I think it was quoted in my office, possibly by myself. I am not positive of that.

258 Q. If you know state what the rate was that was quoted to him?

A. Sixty five cents per hundred minimum 20,000 pounds.

Q. When you say minimum 20,000 pounds what does that mean?

A. That means that is the lowest rate that will be charged for the car, that means that \$130.00 would be the minimum charge.

Objected to by plaintiff as not responsive to the question.

Q. It is an answer, I asked him what the minimum weight was?

Q. The 65 cent rate would not apply on less than 20,000 pounds.

Q. Was the car and stock weighed?

A. No sir.

Q. It was shipped at minimum weight?

A. Shipped at minimum weight.

Q. What was the total rate?

A. \$130.00.

Q. What was the item of \$40.60?

A. It was the rental for an Arms Palace Horse Car.

Q. Just tell the jury about how the Arms Palace Horse Cars are secured, who secures them and pays for them and who gets the money and all that sort of thing?

A. When we get an order from a shipper for a private car, Arms car, we order it through the superintendent of car service, also through the general manager of the Arms Palace Horse Car Company then we are notified by the superintendent of car service the car that will be furnished, and the amount of rental to be collected, and when we bill the car out we bill this rental as an advance charge and remit the money direct to the Arms Palace Horse Car Company.

Q. Mr. Mohr states something about the method of remittance by the Central people, what is the method of the Chicago & Alton people, do you remit to our general auditor or somebody else?

A. I don't know who remits to the Palace Car Company.

259 Q. What interest if any has the Chicago & Alton in the item of \$40.60.

A. None whatever.

Q. Was the item of \$40.60 any part of the transportation charged and collected by the Alton railroad company?

A. No sir, rental for private car.

Q. Now Mr. Eggleston what was there if anything on file in the Chicago & Alton freight depot at the time of this shipment with

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reference to the tariff and rate and conditions of shipment of stock on interstate shipment between Springfield and New York?

A. I don't believe I understand the question.

Q. Well what was there, what did you have there?

A. We had an official classification and tariff quoting commodity rates and governing.

Q. What did you have if anything with reference to the grouping of stations on percentage basis?

A. Well we also had a tariff covering that.

Q. What if anything in addition to those three documents was there necessary to ascertain what the regular established rate between Springfield and New York was?

A. Nothing.

Q. What was there in the office or in the corridor of the freight depot at Springfield with reference to this official classification and schedule and tariff and all that?

A. We have a notice to the public saying the tariffs are on file.

Q. For what purpose?

A. Open for public inspection.

Q. Were those tariffs you have spoken of open for public inspection at that time?

A. Yes sir.

Q. Accessible to the public.

260 A. Yes sir on request.

Q. Now I hand you a book which has been marked "Exhibit D" and ask you to state what that is with reference to the official classification you have spoken of?

A. That is the official classification.

Q. Number 27?

A. Yes sir.

Q. What is that with reference to being the original that was on file in your office, or a copy of that original?

A. That is a copy of the same tariff, same classification.

Q. Now I show you a paper marked Exhibit "E," first I want to identify this classification, as number 27; now I show you exhibit "E" having on its face joint through freight tariff naming rates on commodities, also live stock &c." lettered "C. & A. G. F. D. No. 14700. I. C. C. No. 1505." And will ask you what that is with reference to being the tariff sheet for joint through rates which was on file in your office at the time of this shipment?

A. The same tariff.

Q. Is that one of the things that you have spoken of which was accessible to the public?

A. Yes sir.

Q. I show you a sheet which I ask to be marked Exhibit "K," a sheet that I overlooked yesterday gentlemen that I want to introduce now, it is one of the component parts of the tariff.

Objection by plaintiff to its introduction. Objection overruled by the Court;

Said Exhibit so introduced in evidence being as follows to-wit:

(Here follows tariff sheet marked pages 261 and 262.)



263 This being exhibit "K" and lettered C. & A. G. F. Co. No. 12414 and also lettered I. C. C. No. 1380, and I will ask you to state what that is with reference to being what was on file in your office accessible to the public at the time of this shipment?

A. That is my tariff that was there on file.

Q. Now what are these other papers or documents Mr. Eggleston with reference to being the evidences of the official classification of commodities and the established through freight rates from Springfield to New York?

A. You mean what are they?

A. Yes, what are they with reference to being that thing, are these the three things taken together the evidence and authority for the making of a rate from Springfield to New York?

A. Yes sir.

Q. Now just describe to the jury the manner in which a rate from Springfield to New York on a car load of horses is ascertained from these three documents, described as clearly as you can?

A. Well the classification shows the minimum weight and shows the ruling governing.

Q. First, say that a man came in with a car load of live stock and you wanted to find what classification the live stock was, to what would you turn to first in the classification?

A. To live stock, which is indexed.

Q. Is there an index?

A. Yes sir.

Q. Well, directing your attention to page XX of the index I will ask you if live stock is indexed there?

A. Yes sir.

Q. At what page is the official classification.

264 Objected to by plaintiff, we think it fair for him to let the witness answer the question, we think the witness ought to be permitted to tell of his own knowledge.

The COURT: The question is how would the public or perhaps the customer ascertain, go ahead and tell what the customer would do?

Mr. PATRON: I presume I have a right to get at it step by step what he would do first, second thing, and third thing.

The COURT: I think it would be safe to let the witness tell how it would be done?

A. The first thing would be secure the tariff that shows the live stock commodity.

Q. Now what is that mark there?

A. Exhibit "E."

Q. And on what page of that tariff is the live stock rate found?

A. On page number 4, quoting a rate on live stock of different character and different points in the sheet, then the next step would be, this shows the station by percentage numbers.

Q. Now if there is anything on that tariff which shows how you can determine what percentage number or group number Springfield is?

A. There is a notation on the bottom of the tariff showing for this

station taking the percentage basis in groups shown in C. & A. G. F. D. 12414 interstate commerce 1380 which is this tariff.

Q. Was that on file at the time in your office?

A. On file at the time, this shows on the second page Springfield taking 116 per cent point, which is the 116 per cent one of the groups shown on the part of the tariff quoting live stock rates.

Q. Now what was the regular live stock rate from Springfield to New York on the date of this shipment as shown by the official classification and tariffs on file in your office?

265 A. 65 cents per hundred pounds.

Q. In what lot?

A. In car loads; now in connection with that the tariff on the face of it bears the notation subject to the official classification.

Q. Where is that found, where are the words subject to official classification found?

A. On the face of the tariff quoting commodities, also on the face of the tariff giving the per cent.

Q. What is referred to by the official classification as the official classification?

A. To determine the weight to be used in applying the rate of 65 cents it would be necessary to take the official classification as the tariff quoting the rates constituted the rates on car lots.

Q. Now turn to the official classification at the beginning live stock classification and rates, the part of the official classification having reference to live stock and the application of this tariff to live stock beginning at the first and reading right through?

A. Live stock, car loads (see special tariff).

Q. Will you interpret special tariff, what does that mean?

A. That means this tariff marked Exhibit "E" Subject to the uniform live stock contract and the following regulations.

Q. Subject to the uniform live stock contract, is there in that official classification a copy of that uniform live stock contract?

A. There is.

Q. Turn to that and read the uniform live stock contract?

A. Page 15 of the official classification, a notation on top of the contract—

"Property shipped not subject to uniform bill of lading conditions, will be charged twenty (20) per cent, higher than as herein provided.

266 Subject to a minimum increase of one (1) cent per 100 pounds and cost of Marine Insurance. (See Rule 1.)

Uniform Live Stock Contract.

— STATION, — 190—.

This agreement made this — day of —, 19—, by and between the — Company hereinafter called the carrier and — (Shipper's name) — hereinafter called the shipper;

Witnesseth, that the said shipper has delivered to said carrier live

stock of the kind and number and consigned and destined by said shipper as follows:

Consignee, destination, etc.	Number and description of stock (shipper's load and count).	Weight subject to correction.
------------------------------------	---	-------------------------------------

Advance charges \$.....
Car Nos. and initials.....

for transportation from — to destination, if on the said carrier's line of railroad, otherwise to the place where said live stock is to be received by the connecting carriers for transportation to or toward destination and that the same has been received by said carrier for itself and on behalf of connecting carriers, for transportation subject to the official tariffs, classifications and rules of the said company, and upon the following terms and conditions which are admitted and accepted by the said shipper as just and reasonable, viz:

That said shipper, or the consignee, is to pay freight thereon to the said carrier at the rate of — per — which is the lower published tariff rate based upon the express condition that the carrier assumes liability on the said live stock to the extent only of the following agreed valuation upon which valuation is based the rate charged for the transportation of the said animals and beyond which valuation neither *neither* the said carrier nor any connecting carrier shall be liable in any event, whether the loss or damage occur through the negligence of the said carrier or connecting carriers or their employés or otherwise:

If horses or mules—not exceeding one hundred dollars each.

If cattle or cows—not exceeding seventy-five dollars each.

If fat hogs or fat calves—not exceeding fifteen dollars each.

If sheep, lambs, stock hogs, stock calves, or other small animals—not exceeding five dollars each.

And in no event shall the carrier's liability exceed twelve hundred dollars upon any car load.

That said shipper is to pay all back charges and freight paid by said carrier or connecting carrier upon or for the transportation of said live stock.

That said shipper is at his own sole risk and expense to load and take care of, and to feed and water said stock whilst being transported, whether delayed in transit or otherwise, and to unload the same; and neither said carrier nor any connecting carrier is to be under any liability or duty with reference thereto, except in the actual transportation of the same.

That the said shipper is to inspect the body of the car or cars in which said stock is to be transported, and satisfy himself that they are sufficient and safe, and in proper order and condition, and said carrier or any connecting carrier shall not be liable, on account of any loss of or injury to said stock happening by reason of any alleged insufficiency in or defective condition of the body of said car or cars.

That said shippers shall see that all doors and openings in said car or cars are at all times so closed and fastened as to prevent the escape therefrom of any of the said stock, and said carrier or any connecting carrier shall not be liable on account of the escape of any of the said stock from said car or cars.

268 The said carrier or any connecting carrier shall not be liable for on account of any injury sustained by said live stock occasioned by any or either of the following causes, to-wit:

Overloading, crowding one upon another, kicking or goring, suffocating, fright, burning of hay or straw or other material used for feeding and bedding, or by fire from any cause whatever, or by heat, cold or by changes in weather, or for delay caused by stress of weather, by obstruction of track, by riots, strikes or stoppage of labor or from causes beyond their control.

That in the event of any unusual delay or detention of said live stock, caused by the negligence of the said carrier, or its employees, or its connecting carriers, or their employees, or otherwise, the said shipper agrees to accept as full compensation for all loss or damage sustained thereby the amount actually expended by said shipper, in the purchase of food and water for the said stock while so detained. That no claim for damages which may accrue to the said shipper under this contract shall be allowed or paid by the said carrier or sued for in any court by the said shipper, unless a claim for such loss or damage shall be made in writing verified by the affidavit of the said shipper or his agent, and delivered to the — (Railroad agent's title) * * * Agent of the said carrier, at his office in (Agent's address) within five days from the time said stock is removed from said car or cars; and that if any loss or damage occurs upon the line of a connecting carrier, then such carrier shall not be liable unless a claim shall be made in like manner and delivered in like time to some proper officer or agent of the carrier on whose line the loss or injury occurs.

That whatever the person or persons accompanying said stock under this contract to take care of the same, shall leave the caboose and pass over or along the cars or track of said carrier or of connecting carriers, they shall do so at their own sole risk of personal injury, from whatever cause, and neither the said carrier, nor its connecting carriers shall be required to stop or start their train or caboose cars at or from the depots or platforms, or to furnish 269 lights for the accommodation or safety or the persons accompanying said stock to take care of the same under this contract.

And it is further agreed by said shipper that in consideration of the premises and of the carriage of a person or persons in charge of said stock upon a freight train of said carrier or its connecting carriers without charge, other than the sum paid or to be paid for the transportation of the live stock in his or their charge, that the said shipper shall and will indemnify and save harmless said carrier, and every connecting carrier, from all claims, liabilities and demands of every kind, nature and description by reason of personal injury sustained by said persons or persons so in charge of said

stock, whether the same be caused by the negligence of said carrier or any connecting carrier, or any of its or their employees, or otherwise.

And (Shipper's name) do (does or do) hereby acknowledge that (he or they) had the option of shipping the above described live stock at a higher rate of freight according to the official tariffs, classifications and rules of said carrier and connecting carriers and hereby receiving the security of the liability of the said carrier and connecting railroad and transportation companies as common carriers of said live stock upon their respective roads and lines but ha— (has or have) voluntarily decided to ship same under this contract at the reduced rate of freight above first mentioned.

THE ——— COMPANY,
By ———, *Station Agent.*

Witness my hand.

———, (*Shipper.*)
By ———,
(*Shipper's Agent.*)

———,
(*Witness.*)

270 Q. Now turn back to where we started, page 81, I think it is, to live stock classifications and read the live stock classification, all there is to it, starting where you started before when I interrupted you?

A. Read it all, about cattle, sheep, hogs?

A. The whole business.

A. NOTE 1.—Animals, alive, other than domestic animals, taken only by special agreement.

NOTE 2.—Light Range Horses, mules, Ponies or colts, if not exceeding 750 lbs. each in weight, will be taken in car loads at minimum weight of 20,000 lbs. actual weight to be charged for it in excess of the minimum, at rate provided for horses and mules.

NOTE 3.—The word "calves" as used in this classification applies only to calves under six months old, and when in full car loads to be charged same rate and weight as for sheep; all calves six months old and over to be charged at the same rate and weight as cattle.

NOTE 4.—Cattle and sheep in mixed car loads, loaded in partially double deck cars, will be charged at highest rate for either.

NOTE 5.—Horses and sheep, in mixed car loads, loaded in partially double deck cars; will be charged at highest rate for either.

When shipments are not weighed, they must be way-billed as follows:

Cattle per car 25,000 lbs.

Cattle and calves (see Note 3) in partially deck cars, per car 25,000 lbs.

Cattle and sheep (see Note 4) in partially deck cars, per car 25,000 lbs.

Goats same as sheep. Hogs, single deck per car, 18,000 lbs.

Hogs, double deck per car 28,000 lbs. Horses or mules (including

stallions or Jacks) when not exceeding twenty (20) animals are loaded in one car, per car, 20,000 lbs. (See note 2.)

271 Each additional horse, mule, pony or colt, loaded in same car in excess of 20 animals will be charged for at weight of 1,000 lbs. Horses and sheep, in mixed car loads (see note 5) in partially deck cars per car, 25,000 lbs.

Sheep or calves (see note 3) single deck, per car, 16,000 lbs.

Sheep or calves (see note 3) double deck, per car, 20,000 lbs.

If shipments are weighed, they must be billed at actual weight, but subject to the following minimums:

Cattle per car, 20,000 lbs. Cattle and calves (see note 3) in partially deck cars, per car, 22,000 lbs.

Cattle and sheep (see note 4) in partially deck cars, per car, 22,000 lbs. Goats, same as sheep.

Hogs single deck, per car 16,000 lbs.

Hogs double deck, per car, 22,000 lbs.

Horses and mules (including stallions and Jacks) when not exceeding twenty (20) animals are loaded in one car, 20,000 lbs. (see note 2).

Each additional horse, mule, pony or colt, loaded in same car in excess of 20 animals will be charged for at weight of 1,000 lbs.

Horses and sheep in mixed car loads (see note 5) in partially double deck cars, per car 22,000 lbs.

Sheep and calves (see note 3) single or deck per car, 14,000 lbs.

Sheep or calves (see note 3) double deck per car, 18,000 lbs.

If weighed at destination, the same rule may be applied and corrections made in billing.

When rules of originating railroad company permit, consignor may furnish upper deck extending over part or entire portion of the car, at his expense and risk and rate charged shall be for full double deck car except as above provided for cattle and calves or cattle and sheep or horses and sheep in mixed car loads, in partially double deck cars.

Shipments of live stock in palace or other patent stock cars will be in all respects subject to the maximum and minimum weights

272 established for the conduct of such traffic in the regular live stock cars of the railroads.

Horses or cattle loaded with hogs or sheep in mixed car loads (the hogs or sheep to be kept separate from the cattle or horses by a partition to be erected by consignor under the direction of the station agent) or horses loaded with cattle, to be kept separate by a partition similarly erected, will be charged at weight for cattle in car loads, and at the highest rate for either.

Cattle and calves, in mixed car loads, loaded in single deck cars, will be charged at weight and rate for cattle.

Cattle and calves in mixed car loads, loaded in partially double deck cars will be charged at rate for cattle.

Hogs and calves, or hogs and sheep and calves, in mixed car loads (the hogs to be kept separate from the sheep and calves by a partition to be erected by consignor under direction of the station agent) will be charged at the rate of hogs, in car loads, and at the

highest rate for either; calves (under six months old) being subject to the rate for sheep.

Fowls or poultry in packages, in mixed car loads with cattle or horses, sheep or hogs (the cattle, or horses, sheep or hogs to be kept separate from each other and from the fowls or poultry in packages) will be charged at the weight for cattle in car loads, and at the highest rate for either; except, that it will be permissible to charge for the cattle or horses, sheep or hogs at a minimum car load weights and car load rates provided therefor, and in addition, charge for the fowls or poultry in packages, at the L. C. L. rate provided for same.

When more than a car load of any kind of live stock is offered the surplus will take less than carload weight and rate.

1. Live stock, L. C. L. at the following estimated minimum weights (see notes).

NOTE 1.—Animals, alive other than domestic animals, taken only by special agreement.

273 NOTE 2.—Each mare and colt (colt six months old and under) shipped together, to be rated at estimated weight of 4,500 lbs. weight of any other animal shipped with them to be computed without reference to weight of mare and colt.

NOTE 3.—Each cow and calf (calf six months old and under) shipped together, to be rated at estimated weight of 4,500 lbs. weight of any other animal shipped with them to be computed without reference to weight of cow and calf.

2. Subject to the uniform live stock contract 000 Goats same as sheep.

One horse, mule, pony, colt or domestic horned animal will be rated at 4,000 lbs. man in charge carried free. Each additional horse, mule, pony, colt or domestic horned animal in same car to same consignee at 3,000 lbs. Mare and colt, together (see note 2) 4,500 lbs. man in charge carried free.

Cow and calf, together (see note 3) 4,500 lbs. man — charge carried free.

Stallions or jacks (be sure to take a uniform live stock contract) 5,000 lbs. each man in charge carried free; weight of any other animal shipped with them to be computed without reference to weight of stallion or jack.

On small stock in less than car loads, full fare will be charged to party in charge of same.

On small stock in less than car loads, estimated weights will govern as follows;

A single calf (under six months old) sheep lamb, pig or hog, not crated or boxed, at 500 lbs. each or actual weight when in excess of 500 lbs.

Each additional calf (under six months old) sheep lamb or pig or hog, not crated or boxed, in same car to same consignee, 250 lbs. or actual weight when in excess of 250 lbs.

274 When any shipment of small stock under these estimated weights reaches 5,000 lbs. this weight shall be used until actual weight exceeds that amount, when actual weight shall apply.

In no case shall the charge for less than car load exceed the charge for single deck car.

Animals or small stock, alive in crates, boxes or cages, actual weight (subject to the uniform live stock contract) * * *

-3th. Regulations governing the rates upon live stock given above and rules applying to live stock offered for transportation;

Agents will be expected to thoroughly familiarize themselves with the following, and will take particular care to *acquaint* consignors or their agents with the requirements of the company before accepting live stock for shipment.

Live stock will be taken at the reduced rates fixed in the tariff only when a uniform live stock contract is executed by the station agent and the consignor, and when the release on the back of said contract is executed by men who are to accompany said live stock. If consignor refuses to execute a uniform live stock contract the live stock will be charged twenty (20) percent higher than the reduced rates specified herein; provided, that in no case shall such higher charge be less than one (1) cent per one hundred pounds.

Shipments of live stock must be consigned direct to the party or parties to whom same is to be delivered at destination and will not be received for transportation when consigned "to order of ——" or "notify ——" The rates and classification of live stock as given in this tariff are based on the following maximum valuations:

If cattle or cows, not exceeding \$75 each.

If fat hogs or fat calves, not exceeding \$15 each.

If horses or mules (including stallions or jacks) not exceeding \$100 each.

If sheep, lambs, stock hogs or stock calves, not exceeding \$5 each.

If a full chartered car, on the entire contents of each car, not exceeding \$1,200.

275 The company does not agree to transport live stock by any particular train, within any specified time, nor in time for any particular market, and agents must not give receipts containing such guarantee. Neither will the company be responsible for any loss or damage occurring by the refusal, failure or inability of a connecting line to receive and forward the stock after tender of delivery.

When stock belonging to two or more persons, or when consigned to different parties, is loaded into the same car, or when loaded into a way car, a distinguishing mark should appear upon each head of stock. A tag, securely fastened to the halter will be sufficient for horses or mules. Upon cattle or small stock, one or more initial letters should be marked upon the side of each head of stock. Upon calves, the marks should be clipped or shaved. Corresponding initials should be placed opposite the name of consignee on the way bill or manifest, so as to insure correct and prompt delivery at point of destination.

Fancy small stock requiring special care, should be in crates, boxes or cages; and agents will recommend owners to forward such by the regular express line, which has agents in charge to care for them

(see classification of animals or small stock, alive in crates, boxes or cages).

It should be understood, in receiving live stock of any description for transportation, that the delivery does not commence until the stock had been placed in the car, and the responsibility of the railroad company shall cease upon the delivery of car at station to which consigned the consignor and consignee to load and unload the same, with such reasonable assistance from agents of the company as they can offer at point of shipment and destination.

Animals known to be vicious, or so spirited that they cannot be safely placed alongside of other stock and mares with colts alongside, will not be received unless a uniform live stock contract is executed.

276 The railroad company does not assume any risks from the acts of the animals themselves or to each other, such as biting or kicking such risks must always be borne by the owner nor will the company be accountable for stock escaping, unless placed in the car properly haltered; nor will the company hold itself liable for injury to calves, hogs or other stock, from suffocation, exhaustion, heat or cold. Except when shipped in a full chartered car, sucking calves accompanying cows will be charged for in the manner provided for like small stock.

The owner or his agent may accompany each consignment of horses or mules, carloads or less, to care for same, and will be carried free. One person may be carried free in charge of and going with each consignment of cattle, calves, hogs or sheep, when in carloads to care for same. The permit or authority to ride free to be good only on train with such stock. No free return passage to be given. Attendants in charge of live stock, entitled to free transportation under the provisions of live stock classification will be carried free only upon presentation of permits therefor signed by the railroad agents at points of shipment; it being understood that railroad companies reserve the right to reject or refuse, through their agents to issue such orders or permits for free transportation to any person or party who in the opinion of said agents is not considered a responsible party or proper attendant.

With one, two or three cars of horses or mules, the owner or his agent will be carried free on the same train to take care of the animals; four to seven inclusive belonging to one owner two men in charge and eight cars or more, three men in charge, which is the maximum number that will be carried free for the owner.

With live stock other than horses or mules one man will be carried free on the same train in charge of any one consignment of one to fifteen cars inclusive; and sixteen cars or more, belonging to one owner, two men in charge, which is the maximum number that will be carried free for one owner.

One attendant will be carried free in charge of each consignment of horses up to and including a car load. For each additional attendant with car load or less than car load shipments, a charge of 2,000 lbs. at 1st class tariff rates will be made; provided that

277 in no case shall the charge exceed 1st class passenger fare. This charge to be shown as a separate item on way-bill. In

consideration of consignors or their agents being carried free on the same train with their stock, for the purpose of taking care of it, it will be in all cases their duty to examine the cars before loading; and if they accept them, the stock will be at their risk of loss or damage, occasioned by doors being displaced or other reasons while in transit.

The owner or his agent accompanying stock will be expected to feed, water and care for same at his own expense.

In case of accident or unavoidable delay, because of which it becomes necessary to send live stock forward unaccompanied by the owner or his agent, it will be permissible to do so, and if for this or other reasons, feed is furnished for the stock by or through the railroad company, a charge will be made for the same and collected from the consignee upon delivery. Agents will note such charges or expense upon the way-bill or manifest, and advise agents at destination by telegraph.

When stable traps or other appurtenances, such as harness, racing carts or sulkies, medical chests, clothing, cooking utensils, etc., are forwarded with shipments of horses in less than earloads such articles (excluding feed) shall be charged for at the classified rating provided therefor.

No free return passage will be given.

Agents will be very careful to explain the following requirements to shippers, viz:

Race horses, stallions and other high priced animals, when consignors are unwilling to have the same transported at the above list of values, will be taken only by special arrangement at one and one half first-class rates, calculated at the estimated weights named below, but agents must not accept for shipment such valuable animals without first communicating with the general or division freight agent.

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When value of each animal exceeds	And not over	For one animal charge— pounds.	For two or more animals in same car to one consignee charge each—pounds.
\$100	\$400.00	5.000	4.000
400.00	600.00	5.500	4.500
600.00	800.00	6.000	4.700
800.00	1000.00	7.000	5.500
1000.00	1500.00	9.000	7.000
1500.00	2000.00	11.000	8.500
2000.00	2500.00	13.000	10.000
2500.00	3000.00	15.000	11.500
3000.00	3500.00	17.000	13.000
3500.00	4000.00	19.000	14.500
4000.00	4500.00	21.000	16.000
4500.00	5000.00	23.000	18.500

Animals of greater value than given above will be subject to a corresponding advance in weights furnished in the above table.

Q. I want to offer the one I offered yesterday, Exhibit "K," as part of the established rate now Mr. Eggleston what under what conditions and limitations if any are horses shipped at the rate of sixty five cents, were horses shipped at the rate of sixty five cents a hundred pounds from Springfield to New York?

A. On a limitation of a hundred dollars' valuation on each horse.

Q. And how about the other things in the official classification?

A. In regard to feed and water?

A. All those things that have been read?

A. Well, they were all specified on the contract issued by the company.

Q. What knowledge if any did you have when making the rate of sixty five cents to Mr. Kirby that these horses were said to be horses, race horses of high value running as high as three or four thousand dollars?

A. Not any.

Q. What information if any did he give you of that fact, if it is a fact?

A. Nothing that I remember in regards to the valuation of the horses—I mean the excessive high priced horses.

Q. That is what I mean, if you had been advised of the value of those horses running up as high as three or four thousand dollars apiece what would have been your duty to do under your instructions as agent and under the law.

A. To only accept them under instructions from the general freight agent.

Q. Had you any such instructions from the general freight agent?

A. The matter would have to be taken up at the time of shipment.

Q. Well had you any such instructions with regards to this car load of stock from the general freight agent?

279 A. No sir.

Q. What was the rate that you made to Mr. Kirby of sixty five cents a hundred pounds for this shipment with reference to being the established tariff rate or something else?

A. It was the rate that is published in the tariff, based upon the rules and regulations of the official classifications.

Witness on cross-examination in answer to interrogatories propounded by James M. Graham, Esq., testified as follows, to-wit:

Q. Mr. Eggleston, you are the custodian of the way-bill book and copies of way-bills are you not?

A. Yes sir.

Q. Where is the original waybill in this case?

A. The original way-bills on the Chicago & Alton Railroad go to the auditor's office.

Q. Where is the book in which the press copy of that way-bill was?

A. That has been sent in without record.

Q. Have you made efforts to get them?

A. No sir.

Q. You did have notice they would be required here didn't you?

A. The original way-bill?

A. Yes.

Q. I had no instructions to secure the original way-bill, no sir, the original way-bill I suppose was sent to the auditor by the agent at Joliet.

Q. Well, have you any personal knowledge in the matter?

A. Except that is the rule on the Chicago & Alton Railroad in all cases.

Q. Have you made any inquiry about it?

A. No sir.

Q. Or any effort to locate it.

A. To locate the original way-bill, no sir.

Q. The book containing the press copy of it you say you yourself sent to the agent?

A. They were turned over to the auditing department in that one book of our record.

280 Q. That book I refer particularly to a copy of that original way bill?

A. Yes sir.

Q. Have you got it?

A. No sir.

Q. Where is that office you speak of in Chicago?

A. In Chicago.

Q. When was it sent there?

A. I think it was in October 1906.

Q. How long have you known Mr. Kirby?

A. I could not say positively. I presume probably eight or ten years he has been shipping in and out.

Q. You knew his business?

A. Yes sir.

Q. You knew he had horses in training out at the fair ground all the time?

A. I knew he trained horses, yes sir.

Q. And shipped, you knew he had shipped horses east before?

A. I don't remember that no sir, I know he had shipped to fairs and such as that, had shipped horses and received horses.

Q. You knew in a general way the grade or kind of horses Mr. Kirby handled?

A. Well, I had no positive knowledge, no sir.

Q. In a general way I say you did know?

A. I knew he was a horse trainer, that is I presumed that was his business.

Mr. PATTON: What authority Mr. Eggleston did you have if any from the Chicago & Alton Railroad Company; do you know what the business of Mr. Stuttsman was at that time?

A. Live stock agent.

Q. What were his duties?

A. Soliciting shipments of live stock.

Q. What authority if any if you know, what authority if any did he have to make contracts of shipments?

281 A. I could not say what authority he had any more than soliciting stock shipments, I don't know what his duties were outside of that, I don't know what instructions he had from his superior officer.

Q. What authority did you have from your superior officers with reference to making a special agreement for the joint tariff rate?

A. Limiting the liability?

A. Yes.

A. Just what is covered in the tariff and is on the contract, we ship under general rules and instructions.

Mr. GRAHAM: You were the head of the freight department here?

A. I have charge of the freight department, yes sir.

Q. General freight agent?

A. No sir, just freight agent.

Q. What I mean is there was nobody above you in Springfield in the C. & A. freight business?

A. No sir, I beg your pardon, there is a division freight agent located here.

Q. He has nothing to do with running your office?

A. He is my superior officer.

Q. But he had nothing to do with the particular matters of your office any more than he had with the management of the office when he made the return?

A. He has general supervision over the office.

Here defendant rested its case, whereupon the plaintiff introduced in rebuttal, that is to say:

A. L. THOMAS being recalled in answer to interrogatories propounded by James M. Graham, Esq. testified as follows to-wit:

Q. You are the same A. L. Thomas who testified in chief in this case?

A. I did.

282 Q. Mr. Thomas, if you have at any time prior to the 24th of January 1906 shipped car loads of horses from Omaha or any point west of Joliet by way of Joliet and the Joliet cut off to connect with the horse special on the Michigan Central you may state about it?

Objected to by defendant as incompetent immaterial and irrelevant, a shipment originating at Omaha on some other line than the Chicago & Alton, therefore no inference can be drawn from such shipment so originated.

The COURT: What is it you are rebutting?

Mr. GRAHAM: The testimony of some of the defendant's witnesses to the effect that such thing was not done.

The COURT: The testimony of the defendant was it was done, the agent at Joliet testified.

Mr. GRAHAM: We are not bound by his testimony, the testimony of the train dispatcher though was in contradiction of Mr. Mohr's

testimony, the fact that one of their witnesses testified that way does that bar us from contradicting the others who testified differently.

The COURT: Did any of their witnesses testify it was never done?

Mr. PATTON: No sir.

The COURT: They testified to the due course of business and things of that kind but did any of them testify it was not done. I don't believe that matter is an open question according to my recollection of it.

Mr. GRAHAM: Well, I can only give my recollection of it, and the impression it made on me at the time was that the train dispatcher and the train master testified it was never done.

The COURT: In substance that in the usual course of business it was to bill them by way of Chicago but did any of them testify they never took a shipment for this class of train by way of Joliet didn't they all admit that it sometimes occurred, but when it did occur it was by special arrangement and notice given: I am inclined to think that question is not an open question to the extent you may rebut it.

283 N. T. KIRBY, being recalled in answer to interrogatories propounded by James M. Graham, Esq. testified as follows, to-wit:

Q. Mr. Kirby, what was in your judgment the actual weight of the 14 horses shipped in that car?

Objected to by defendant as wholly immaterial, unimportant, irrelevant and incompetent.

The COURT: Well, I am inclined to think the objection is not good upon any one of the grounds stated, but I am of opinion there is no issue as to whether they exceeded 20,000 pounds, but I don't see any reasons in rebuttal why you may not show what it was.

Mr. GRAHAM: I think myself it is barely material enough to be admissible, and it is not on the theory that they had exceeded the minimum weight, but on the theory they were much below it.

Mr. PATTON: There is no claim here of excess of minimum weight.

The COURT: It is announced by counsel for defendant that they do not claim that the weight exceeded the minimum weight as specified in the schedules for car loads, and the Court holds that that being conceded there is nothing to rebut.

JAMES W. JOHNSON, being first duly sworn — answer to interrogatories propounded by Albert Salzenstein Esq. testified as follows, to-wit:

Q. State your name to the jury?

A. James W. Johnson.

Q. What is your business?

A. Claims attorney for the Eastern Division of the Chicago & Alton railroad.

Q. How long have you been such agent employed by the Chicago & Alton Railroad Company?

A. Five years, a little over five years.

Q. I wish you would look at this and see if that is your hand writing and statement?

A. Yes sir, my signature.

Q. On the last page there, just look it over?

284 A. I think that is mine as I remember it.

Q. You remember making that statement?

A. Yes sir.

Q. Do you remember how that statement came to be made?

A. By some arrangement between you and Mr. Patton as I understand it, but the details I don't remember, you know it is some time ago and just one of the details of my office that has passed out of mind.

Q. Was it not done for the purpose of postponing the case?

A. It might have been, I would not say it was not.

Q. I will ask you Mr. Johnson whether the Chicago & Alton Railroad Company has any evidence that notice was given to the Michigan Central Railroad Company of this shipment of the Kirby horses prior to January 25, 1906?

Objected to by defendant, what is the purpose of it?

The COURT: What do you want to rebut by that?

Mr. SALZENSTEIN: It is simply a statement made by Mr. Johnson filed at the March term 1907 where he makes a certain statement.

The COURT: But this is rebutting evidence what is it you want to rebut?

Mr. SALZENSTEIN: Nothing particular except there is testimony showing no notice was given to this railroad company of this shipment prior to this date and by reason of that they could not have made the arrangements.

The COURT: But what do you purpose to rebut, your witness testified and also the witnesses for the defense, nobody claims they were notified, what is there to rebut, you claim they were not notified and the witnesses from that railroad testify they were not notified.

Mr. PATTON: And there is a stipulation on file that they were not notified.

The COURT: So there is nothing to rebut.

Here plaintiff closed his case and this was all the evidence offered by either party in the case.

285 Thereupon at the close of all the evidence in the case the defendant by its counsel then and there moved the Court in writing, as follows to-wit:

STATE OF ILLINOIS,
County of Sangamon, ss:

In the Circuit Court, to the January Term, A. D. 1908.

NATHANIEL T. KIRBY
vs.
CHICAGO & ALTON RAILROAD COMPANY.

Motion at Close of All Evidence.

And now at the close of all the evidence in the above entitled cause comes the defendant by its attorneys and moves the Court to exclude the evidence from the jury and to instruct the jury to find the issues for the defendant, and presents such instructions in writing herewith.

And as grounds for such motion, the defendant shows the following that is to say:

I.

For that the evidence does not fairly tend to prove the cause of action as laid in the declaration.

II.

For that there is no evidence fairly tending to establish the cause of action stated and charged in the declaration.

III.

For that the material averments of the declaration are not supported by proof legally sufficient to authorize the submission of the case to the jury.

IV.

For that the alleged oral contract declared upon was merged in the written contract offered in evidence and hence no cause of action can be predicated on said oral contract.

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V.

For that the proof is variant from the declaration in this, viz: that the declaration sets out a special contract for shipment of horses upon terms set out in the declaration while the proof shows that a written contract of shipment was made and executed and signed by the plaintiff subsequent to such alleged oral contract variant from and differing from said special contract set out in the declaration.

VI.

For that there is no evidence legally tending to prove that the alleged damage was the proximate result of the breach of the special contract set out in the declaration.

VII.

For that under the terms of the contract set out and alleged in the declaration and the evidence in connection herewith the defendant is not legally entitled to recover any sum or amount in this action.

VIII.

For that on the whole evidence it appears without any controversy of fact, that the alleged contract set out and relied upon in the declaration and the proof was and is an illegal contract and wholly void and unenforceable.

IX.

For that upon the uncontroverted facts in evidence, the contract relied upon by the plaintiff in the case is in violation of law and unenforceable.

X.

For that to permit a recovery by the plaintiff in this case would be to enforce a contract entered into by plaintiff which would have enabled plaintiff to secure and enjoy a rate upon the shipment of his horses not open to the public, unduly preferential to him and unjustly discriminatory against the public, and in violation of the act of Congress of February 4th 1887 and its then existing amendments known as the "Act to regulate Commerce."

IX.

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For that the special contract alleged in the declaration is shown by the proof to be such a contract as would enable the plaintiff to secure an undue preference over other shippers of goods of the same class and value and from the same point to the same terminus.

XII.

For that if the plaintiff should be allowed to recover on the contract alleged in the declaration, he would thereby be given an unlawful preference, and other shippers of the same class of goods from the same point to the same terminus would be unjustly discriminated against in this, that under the classification and interstate tariff in evidence the rate at which the plaintiff shipped his horses was a rate for shipment under the uniform live stock contract and the restrictions and limitations contained in the classification and subject to the limitations of liability upon the part of the carrier therein contained and was the published rate for shipment with such limitations; whereas plaintiff claims by special agreement to have shipped said horses for the same rate, with a special train and route and with no limitation on the common law liability of the carrier.

XIII.

For that the alleged special contract was void in that it was in violation of the provisions of the Act of Congress of February 4th, 1887 and the then existing amendments thereto, known as the "Act to regulate Commerce" or the "Interstate Commerce Act."

XIV.

For that said special contract was void by reason of the fraud of the plaintiff in securing a rate on said shipment which was a special rate, and constituted an undue preference to him and an unjust discrimination against other shippers of goods of the same class from the same point to the same terminus, in violation of said act of congress.

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XV.

For that inasmuch as the official classification and joint interstate tariff had been duly filed with the Interstate Commerce Commission and duly published under the rules of said Commission, and were open to the inspection of plaintiff as provided by law and the rules of said commission, the acceptance of the rate of 65 cents by plaintiff, the same being the published rate for service under the restrictions and limitations contained in such classification and joint interstate tariff, constituted a contract under such restrictions and limitations, and in no other wise, and did not constitute the contract set out in the declaration, but another and different contract, and one under which defendant was under no obligation to deliver to any particular train and under which the obligations of defendant were limited and restricted by the terms and conditions contained in said classification and joint interstate tariff.

XVI.

For that the evidence shows no valid consideration for the contract alleged and set out in the declaration passing from the plaintiff to the defendant.

XVII.

For that defendant was wholly without legal power and authority and was forbidden by law to enter into the contract alleged and set out in the declaration and relied upon by plaintiff.

XVIII.

For that plaintiff was forbidden by law to enter into the contract alleged and set out in the declaration and relied upon by the plaintiff.

XIX.

For that the making and entering into such a contract as that set out and alleged in the declaration and relied upon by plaintiff was prohibited by law both to defendant and to plaintiff.

XX.

For that by accepting the rate of 65 cents the plaintiff is estopped to deny that the contract between plaintiff and defendant was the same as that open to all shippers of goods of the same class from the same point to the same terminus, to-wit; a contract subject to the conditions, limitations and restrictions contained in the official classification and joint interstate tariff then on file and open for inspection in the freight depot of defendant at Springfield Illinois which is and was a contract other than and variant from the contract alleged and set out in the declaration of the plaintiff.

XXI.

For that the horses were routed and shipped via Joliet at the special instance and direction of plaintiff, and in obedience to his directions, although he was informed by defendant that the safe, proper and correct routing was via the Stock Yards.

XXII.

For that the delay and failure to get the shipment upon the Fast Horse Special running out of Chicago on January 25th was occasioned by the orders and direction of plaintiff to route and ship the same via Joliet.

XXIII.

For that the damage sustained by plaintiff was not sustained while the shipment was in the custody or possession of defendant.

XXIV.

For that the notice of loss or damage provided for and required in the written contract executed by plaintiff was not given by defendant.

XXV.

For that the notice of loss or damage provided for and required in and by the official classification and joint interstate tariff and uniform live stock contract therein contained was not given to defendant.

XXVI.

For that in and by his written contract plaintiff waived any right of action for delay in delivery.

XXVII.

For that under and by virtue of the said written contract so signed and executed by plaintiff, and under the terms, conditions, limitations and restrictions therein contained the plaintiff has no right of action against defendant.

XXVIII.

For that under and by virtue of the terms, conditions, limitations and restrictions contained in the official classification and joint interstate tariff aforesaid, the plaintiff has no right of action against the defendant.

PATTON & PATTON,
Attorneys for Defendant.

Instruction.

The Court instructs the jury to find the issues for the defendant.

But the Court overruled said motion and refused to give said instruction to the jury as asked by defendant; to which action of the Court in overruling said motion and refusing to give said instruction to the jury the defendant by its counsel then and there excepted.

Thereupon the Court on motion of the plaintiff gave to the jury the following instructions to-wit:

I.

The Court instructs the jury that if you believe from the evidence in this case, that previous to January 25, 1906, the plaintiff made an oral or verbal contract with the defendant to ship a certain load of high bred horses over its road to New York for the Madison Square Garden sale the latter part of January 1906 for the sum of \$170.60 and as part of such oral or verbal contract defendant agreed 291 to promptly carry and deliver the same so that the same should be carried and transported to New York on the fast stock train of the Michigan Central Railroad known as the "Horse Special" and that such contract is set out in substance in plaintiff's declaration, and that said oral or verbal contract was not thereafter knowingly changed by plaintiff, but in reliance thereon plaintiff delivered his horses to defendant to be shipped, then it became and was the duty of defendant to have made the arrangement provided for in said contract, and if it failed so to do and thereby plaintiff was not able to ship on said "Horse Special" and was obliged to take other and inferior accommodations, and by reason thereof said horses were subjected to delays and did not reach New York as early as they otherwise would by some thirty hours and were continued on the road that much longer and by reason thereof such horses became sore and tired out and one or more of them became sick, and by reason of such condition without any fault on the part of plaintiff said horses did not bring as much on the market at New York as they otherwise would have done, then the plaintiff is entitled in this suit to recover such loss or damages if any and also the difference he was obliged to and did pay if any in excess of said sum of \$170.60.

II.

The Court instructs the jury that if you believe from the evidence in this case that plaintiff made a contract with the defendant as set

out in his declaration previous to January 25, 1906, then plaintiff is not bound by the terms of the written contract of January 25, 1906, unless the evidence shows that he was informed by defendant or some of its employes of the contents thereof, or that he knew the contents or the substance thereof, or that he signed it with the purpose of changing such contract so previously made, if you find from the evidence that such previous contract was so made.

III.

292 The Court instructs you that you are the sole judges of the credibility of the witnesses and the weight to be given to the testimony of each witness; and in weighing their evidence you have a right to take into consideration their manner of testifying, their appearance and demeanor while on the witness stand, their knowledge of the matters about which they testify, their apparent candor and fairness or want of the same, and from all the evidence and all the facts and circumstances in evidence, you should give to the testimony of each witness such weight and credit, and only such weight and credit as under all the evidence and facts and circumstances in evidence you believe it entitled to receive.

To the giving of each and all of said instructions to the jury as asked by plaintiff, the defendant by its counsel then and there excepted.

Thereupon the defendant by its counsel then and there asked the Court to give to the jury the following instructions, to-wit:

1.

The Court instructs the jury that if you shall believe from all the evidence that the written contract in evidence, signed by the plaintiff was the agreement and contract of the plaintiff and defendant, you should find the issues for the defendant.

2.

The Court instructs the jury that if you shall believe from the preponderance of the evidence that when plaintiff signed the contract in evidence he knew that it was a contract for the shipment of his horses, even though you may believe from the evidence that he did not know what the terms and provisions of the contract so signed were, you should find the issues in this case for the defendant.

3.

The Court instructs the jury that when parties execute a written contract, all the terms and conditions of former oral negotiations concerning the same subject matter are merged in the written contract, and the rights and obligations of the parties to each other are not thereafter governed or affected by the oral negotiations or agree-

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ments.
And even though you may believe from the evidence that Stuttsman agreed to ship the horses by way of Joliet and to

catch the Horse Special, yet if you further believe from the evidence that thereafter plaintiff signed the written contract in evidence, knowing that it was a contract, for the shipment of horses, you should find the issues for the defendant, even though you should further believe that plaintiff did not read or know the provisions of said written contract.

4.

The Court instructs the jury that the official classification No. 27, and the two joint through tariff sheets introduced in evidence, taken and read and construed together show the legal rate on the shipment of horses from Springfield to New York, and that any contract made for any other or different rate, than the rate shown by those documents would be wholly illegal, void and unenforceable. And it can make no difference whether the shipper actually knew of the existence of these documents or the rate set forth therein or not.

5.

The Court instructs the jury that under the law a railroad company has no right to give, and a shipper has no right to accept a rate other than or different from the rate shown by the tariffs on file with the Interstate Commerce Commission and published according to the rules of such commission, and you are further instructed that any contract of shipment based on any other than the published rate is illegal and void.

And if you shall believe from the evidence that the Official Classification No. 27 and the two joint through freight tariffs offered in evidence had been duly filed with the Interstate Commerce Commission and duly published by defendant in accordance with the rules of such commission, and were in the freight depot of defendant at Springfield, accessible to the public on request, then and in such case the rules, conditions, restrictions, limitations and rates set forth in these documents were in full force and effect and were binding on both the defendant and the plaintiff.

And if you shall further believe from the evidence that plaintiff procured and accepted a rate of 65 cents per 100 pounds on his car load of horses, the same being shipped without weighing at a rate of 20,000 pounds, then and in such case the defendant would have no right or power or authority to agree to transport the horses by any particular train, within any specified time or for any particular market, nor would plaintiff have any right or power or authority to accept such contract or agreement, and in such case you should find the issues for the defendant.

6.

The Court instructs the jury that under the law the plaintiff was not bound to know what the rate shown by the official classification and two joint tariff sheets in evidence was, and though he may have been actually ignorant of the existence of those documents, yet if you shall believe from the evidence that the rate which he contracted to pay was a rate shown in those documents to be for the

transportation of horses from Springfield to New York subject to the conditions, restrictions and limitations contained in the official classification and the rules and regulations therein set forth, you should find the issues for the defendant, even though you should believe from the evidence that Stuttzman agreed with plaintiff to ship by way of Joliet and to connect with the Horse Special.

7.

The Court instructs the jury that when a tariff is filed with the Interstate Commerce Commission and duly published according to the rules of such commission, the rates therein set forth and the conditions, limitations and restrictions on the liability, duty and obligation of the railroad therein set forth become and are the only rates which the railroad has the right to give or the shipper to accept. And you are further instructed that the railroad has no power to contract with a shipper for a service or character of transportation imposing a greater duty or obligation on the railroad in favor of that shipper than the tariff shows all shippers to be entitled to at the same place.

And you are further instructed that if you believe from the evidence that the contract set out in the declaration would have resulted in a higher degree of service to the plaintiff, and in the assuming of a greater obligation by the defendant in favor of the plaintiff than the plaintiff would be entitled to under the rate, rules and regulations set forth in the official classification and two joint through freight tariffs in evidence, such contract would be wholly illegal and void, and in such case you should find the issues for the defendant.

8.

The Court instructs the jury that even though you may believe from the evidence that the employes of the defendant quoted to plaintiff a rate of 65 cents per hundred pounds upon the horses, and agreed for that rate so to manage the shipment that it should go by way of Joliet and connect with the Horse Special, and though you may believe from the evidence that plaintiff honestly believed that the railroad had a legal right to make, and that he had a legal right to accept such contract, yet if you further believe from the evidence that the rate of 65 cents per hundred pounds was the tariff rate, and was a rate for the transportation of horses from Springfield to New York subject to the rules, regulations, conditions and limitations of the official classification, such contract for such additional service to plaintiff and additional duty and obligation upon defendant was void, and in such case you should find the issues for the defendant.

9.

The Court instructs the jury that under the law, the words written on the way bill in evidence as follows: "c/o Fast Horse train out of Chgo. on M. C. Ry. about 3 P. M. Thursday Jan'y. 25th," could not and did not impose any legal duty or obligation on de-

defendant to insure, guarantee or at all events to procure the shipment of the horses on the Fast Horse train, nor could any words, contract or agreement to the same effect made by any agent of defendant impose any such legal duty or obligation on the defendant.

10.

The Court instructs the jury that even though you may believe from the evidence that plaintiff honestly believed that the rate he paid entitled him to contract with defendant that defendant would ship by way of Joliet and connect with the Fast Horse train, and though you may believe such an agreement was actually made, by Stuttzman with plaintiff, nevertheless the plaintiff would not be entitled to recover damages for a breach of such a contract by the defendant and in such case you should find the issues for the defendant.

11.

The Court instructs the jury that even though you may believe from the evidence that plaintiff honestly believed that the rate he paid entitled him to contract with defendant, and entitled defendant to contract with him that in consideration of such payment defendant should ship the horses by way of Joliet and should
297 make connection with the Fast Horse Special, and though you may believe such an agreement was actually made by Stuttzman with plaintiff, yet if you further believe from the evidence and the stipulation of counsel read to you, that the Official Classification No. 27 and the two joint through freight tariffs in evidence had been duly filed with the Interstate Commerce Commission and published in accordance with the rules of such Commission, and that the rate paid by plaintiff did not justify or authorize the making of such a contract under the rules, regulations, restrictions and terms of said classification and tariffs, then and in such case you should find the issues for the defendant.

12.

The Court instructs the jury that a contract made by a shipper with a carrier that that shipper's goods or live stock shall be carried in a specified time by a particular train or for a particular market in consideration of the straight tariff rate for the transportation of goods of the same class to the same destination is void and unenforceable, and the shipper can acquire no right to damages against the carrier by reason of or on account of such contract.

And you are further instructed that if you shall believe from the evidence that official classification No. 27, and the two tariffs introduced in evidence had been duly filed with the Interstate Commerce Commission and published in accordance with the rules of such commission, then and in such case those documents, taken, construed and read together constituted and showed what the legal rate for the shipment of plaintiff's horses was.

And the defendant had no power to change or alter such rate by contract, or to give the plaintiff any benefit or advantage in his

dealings with it, over any other shipper paying the same rate on the same class of goods for carriage from the same place to the same destination.

298 And you are further instructed that the plaintiff could not legally procure from defendant or contract with defendant for himself any benefit or advantage over another shipper paying the same rate on the same class of goods for carriage from the same place to the same destination.

And you are further instructed that if you shall believe from the evidence that the effect of the contract set out in plaintiff's declaration would have been to enable plaintiff to secure for himself a superior service, and a preference over other shippers who might pay the same rate, on the same class of goods for carriage from the same place to the same destination, then and in such case you find the issues for the defendant.

But the Court refused to give each and all of said instructions to the jury as asked by defendant.

To which action of the Court in refusing to give each and all of *each* instruction- to the jury, the defendant by its counsel then and there excepted.

Thereupon the Court on motion of the defendant gave to the jury the following instructions, to-wit:

13.

The Court instructs the jury that if you shall believe from the evidence that no contract was made by the defendant that it would carry the horses of plaintiff to Joliet and arrange that the same should be carried on the Horse Special to New York, you should find the issues for the defendant.

14.

The Court instructs the jury that if you shall believe from the evidence that the defendant billed the horses to Joliet in care of the Horse Special by the directions of plaintiff, and that defendant did not specially contract with plaintiff that connection would be made with the Horse Special by way of Joliet, you should find the issues for the defendant.

299

15.

The Court instructs the jury that even though you may believe from the evidence that Stuttzman agreed that the horses should go by way of Joliet and connect with the Horse Special yet if you further believe from the evidence that Stuttzman had no real or apparent authority to make such a contract, you should find the issues for the defendant.

16.

The Court instructs the jury that if you shall believe from the evidence that the horses were routed and shipped by way of Joliet because of the demands and directions of the plaintiff, and in re-

liance upon his statements that connection could be there made with the Horse Special, and without any special agreement by the defendant that the horses would make connection with the Horse Special, you should find the issues for the defendant.

17.

The Court instructs the jury that if you shall believe from the evidence that the plaintiff was informed that his horses could be carried by defendant to the Chicago Stock Yards, and there delivered to the Michigan Central Railroad Company so that said horses could then be carried to New York on the Horse Special, and if you further believe from the evidence that plaintiff thereupon directed that his horses should be taken to Joliet and there delivered to the Michigan Central Railroad, and that such route was followed by defendant at the special directions of plaintiff, and that defendant made no special contract that a connection should be made with the Horse Special by way of Joliet, you should find the issues for the defendant.

300 Thereupon the jury returned into Court with a verdict in favor of the plaintiff and against the defendant, and for their verdict, say:

We the jury find the defendant guilty and we assess plaintiff's damages at the sum of Four Thousand Two Hundred (\$4200.00) Dollars.

Thereupon the defendant by its counsel then and there moved the Court to set aside the verdict of the jury as returned in this cause and to grant a new trial of the same and in support of said motion filed the following reasons in writing, to-wit:

STATE OF ILLINOIS,

County of Sangamon:

In the Circuit Court, to the January Term, A. D. 1908.

NATHANIEL T. KIRBY

VS.

CHICAGO & ALTON RAILWAY COMPANY.

Motion for a New Trial.

And the defendant, by its attorneys, moves the Court to set aside the verdict heretofore rendered in the above entitled cause, and to grant a new trial herein, and as grounds for such motion, shows to the Court here the following, that is to say:

1. The Court improperly admitted on the trial improper evidence offered by the plaintiff.

2. The Court improperly overruled various motions made by defendant during the cause of the trial to exclude from the jury improper evidence theretofore offered by plaintiff and admitted by the Court.

3. The Court improperly refused to admit proper evidence offered by the defendant.

4. The Court improperly qualified the effect of the evidence offered by and admitted on behalf of the defendant by oral statements to the jury concerning the same.

301 5. The Court improperly refused at the close of all the evidence to instruct the jury to find the issues for the defendant.

6. The Court improperly denied the motion made by defendant at the close of all the evidence to exclude the evidence from the jury and to instruct the jury to find the issues for the defendant and improperly refused the written instruction to the jury presented therewith, to find the issues for the defendant.

7. The verdict is against the law.

8. The verdict is against the evidence.

9. The verdict is against the laws of the United States, and particularly against and in contravention of the Act of Congress of February 4th, 1887, and the amendments thereto, known as the "Interstate Commerce Act" or the "Act to regulate commerce."

11. The amount of the verdict is excessive.

12. The Court improperly refused the instructions offered and asked by the defendant and each of them being numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12.

13. The Court improperly gave to the jury the instructions offered and asked by the plaintiff and each of them, being numbered 1, II, III.

Wherefore, etc.

PATTON & PATTON,
Attorneys for Defendant.

But the Court overruled said motion and refused to set aside the verdict of the jury and to grant a new trial in this cause, and gave a judgment on the verdict as returned by the jury herein; to which action of the Court in overruling said motion and refusing to set aside the verdict of the jury and to grant a new trial of this cause, and giving judgment on the verdict of the jury as returned
302 in this cause, the defendant by its counsel then and there excepted, and prays, an appeal of this cause to the Appellate Court of the Third District of the State of Illinois, which is allowed by the Court on condition that the defendant herein file with the Clerk of this Court a good and sufficient bond, conditioned according to law, in the penal sum of Forty six hundred dollars within seventy days from the 22nd day of February 1908, together with its bill of exceptions within seventy days from the 22nd day of February, 1908.

And forasmuch as the matter and things above set forth do not fully appear of record the defendant tenders this its bill of exceptions, and prays that the same may be signed and sealed by the Judge of this Honorable Court, trying said cause, pursuant to the

statute in such case made and provided; which is accordingly done at Springfield, Illinois this 2nd day of April A. D. 1908.

JAMES A. CREIGHTON, [SEAL.]
Judge.

It is hereby stipulated and agreed by and between the respective parties hereto that the above and foregoing bill of exceptions may be used for all purposes of appeal or writ of error in lieu of the clerk's copy of the same.

A. SALZENSTEIN,
J. M. GRAHAM,
Attorneys for Plaintiff.
PATTON & PATTON,
Att'ys for Def't.

Filed April 7, 1908.
S. T. JONES, *Clerk.*

303 STATE OF ILLINOIS,
Sangamon County, ss:

I, S. T. Jones, Clerk of the Circuit Court within and for the County of Sangamon, in the State of Illinois, and keeper of the records and seal of said Court do hereby certify that the foregoing is a true, perfect and complete copy of the convening order of said Court for the January term A. D. 1908; also of certain papers filed, the orders and proceedings of said Court, the appeal bond and the original bill of exceptions, together with the stipulation of the parties hereto to incorporate said original bill of exceptions in the appeal record in a certain cause then pending in said Court on the Law side thereof wherein

NATHANIEL T. KIRBY was Plaintiff
and
CHICAGO AND ALTON RAILROAD COMPANY was Defendant

as the same appear from the records and files of said Court in my office remaining.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said Court, at Springfield this 8th day of April A. D. 1908.

[SEAL.]

S. T. JONES, *Clerk.*

304 *Assignment of Error.*

And now comes the Chicago & Alton Railroad Company by its attorneys and shows to the Court here that there is manifest error in the record herein in this, that is to say:

1. The Court erred in admitting on the trial improper evidence offered by appellee.

2. The Court erred in improperly overruling various motions made by appellant during the cause of the trial to exclude from the

jury improper evidence theretofore offered by appellee and admitted by the Court.

3. The Court erred in improperly refusing to admit proper evidence offered by appellant.

4. The Court erred in improperly qualifying the effect of evidence offered by and admitted on behalf of appellant by oral statements to the jury concerning the same.

5. The Court erred in improperly refusing at the close of all the evidence to instruct the jury to find the issues for the appellant.

6. The Court erred in improperly denying the motion made by appellant at the close of all the evidence to exclude the evidence from the jury and to instruct the jury to find the issues for the appellant, and in improperly refusing the written instruction to the jury presented therewith, to find the issues for appellant.

7. The Court erred in overruling appellant's motion to set aside the verdict and for a new trial.

8. The Court erred in not granting appellant's motion to set aside the verdict and for a new trial.

9. The Court erred in entering judgment on the verdict in favor of appellee and against appellant.

10. The Court erred in refusing to properly instruct the jury on motion of appellant and in refusing to give to the jury the instructions offered and asked by appellant, and each of them, being numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12.

11. The Court erred in improperly instructing the jury on motion of appellee, and in improperly giving to the jury, the instructions offered and asked by appellee, and each of them, being numbered I, II and III.

Wherefore, for the reasons above set forth and which the record will sustain the judgment of the said Court ought to be reversed.

PATTON & PATTON,
Attorneys for Appellant.

F. S. WINSTON, Esq.,
Of Counsel.

395 I, William C. Hippard, Clerk of the Appellate Court for the Third District of the State of Illinois, do hereby certify that the foregoing is a complete record in a certain case wherein Chicago & Alton R. R. Co. was appellant and N. T. Kirby was appellee as the same was filed in my office on the 16th day of May A. D. 1908.

In testimony whereof I hereunto set my hand and the seal of said Appellate Court, at Springfield this 12th day of December A. D. 1908.

[SEAL.]

WILLIAM C. HIPPARD,
Clerk Appellate Court, 3rd District.

Transcript of Proceedings in Appellate Court, Third District, State of Illinois, May Term, A. D. 1908.

In the Matter of N. T. KIRBY
vs.
CHICAGO & ALTON RAILROAD Co.

Fees for record:

Certifying original.....	\$.....
Balance Clerk fees.....	\$.....
Copy of Opinion.....	\$.....
	<hr/>
	\$39.50

Dec. 23, '08.

Filed Jan. 13, 1909. J. McCan Davis, Clerk of Supreme Court.

307 STATE OF ILLINOIS:

Appellate Court, Third District, May Term, 1908.

At an Appellate Court for said Third District, State of Illinois, begun and held at Springfield, in said State, on the 19th day of May, 1908, the same being the third Tuesday in said month of May, 1908, said term of said Court being held according to law.

Present:

Hon. Leslie D. Puterbaugh, Presiding Justice.
Hon. James S. Baume, Justice.
Hon. Frank D. Ramsay, Justice.
William C. Hippard, Clerk.
C. W. Murray, Sheriff.

Court opened by proclamation.

Attest:

WILLIAM C. HIPPARD, *Clerk.*

308 Be it Remembered, that to wit: on the 16th day of May A. D. 1908, there was filed in the office of the Clerk of said Appellate Court a certain Transcript of the record and proceedings had in the Circuit Court of Sangamon County, State of Illinois, wherein N. T. Kirby was plaintiff, and Chicago & Alton R. R. Co. was defendant, from the finding and judgment of said Circuit Court, in said cause, the said Chicago & Alton R. R. Co. appealed to the Appellate Court, Third District, Illinois, and brings here and files said Transcript, which is placed upon the Docket of said Appellate Court as follows, to-wit:

#45.

N. T. KIRBY, Appellee,

vs.

CHICAGO & ALTON R. R. Co., Appellant.

Appeal from Circuit Court of Sangamon County.

309 And be it further remembered that afterwards to-wit on the 2nd day of June A. D. 1908, it being one of the days of the said May Term A. D. 1908 of the said Appellate Court, come the appellee herein by attorneys and presents to the Court now here a certain motion supported by affidavit, which said motion and affidavit are in the words and figures following to-wit:

In the Appellate Court, State of Illinois, Third District, May Term,
A. D. 1908.

N. T. KIRBY, Appellee,

vs.

CHICAGO & ALTON R. R. Co., Appellant.

Appeal from Circuit Court of Sangamon County.

And now comes the appellee by his attorneys and moves the Court for an extension of time, ten days if possible, in which to file his brief and argument and for cause of this motion refers to the affidavits thereto attached.

ALBERT SALZENSTEIN,
JAMES M. GRAHAM,

Attorneys for Appellee.

Received a copy of the above notice and within affidavit this 1st day of June A. D. 1908.

PATTON & PATTON,

Attorneys for Appellant.

In the Appellate Court, State of Illinois, Third District, May Term,
A. D. 1908.

N. T. KIRBY, Appellee,

vs.

CHICAGO & ALTON R. R. Co., Appellant.

Appeal from Circuit Court of Sangamon County.

STATE OF ILLINOIS,

County of Sangamon, ss:

310 Albert Salzenstein, being first duly sworn states that he is the principal attorney for appellee in the above entitled

cause and had expected to prepare appellee's brief in time to be filed under the rules of this Court, but that he has been ill this Spring and that since improving in health he has been doing his best to finish all his briefs and file them in the time allowed by the rules of this and the Supreme Court and in carrying this out has been for more than two weeks past constantly engaged in preparing such briefs and has prepared appellee's brief in *Edward D. Keys et al., vs. Addie B. Wohlegemuth et al.*, in this court, appellee's brief in *James T. Conrad vs. Springfield Consolidated Ry. Co.*, also in this court; appellant's brief and abstract in *Lavada M. Pillo vs. Francis F. Pillo* also in this Court; also in this Court: Appellant's brief and abstract in the case of *The R. Haas Electrical and Manufacturing Company et al. vs. Springfield Amusement Park Company et al.*, appealed from this Court to the Supreme Court and has been unable to do anything in the preparation of Appellee's brief in the above entitled case. That his associate counsel, James M. Graham, has been engaged in the trial of a contested jury case in the Circuit Court of Sangamon County, continuously for a week and since has had to meet other pressing engagements and prepare other briefs for this Court and has done nothing towards the preparation of the brief in this case.

Affiant states that this cause is important not only for the amount involved but on account of the questions presented which require thorough and careful briefing, one of them involving the application of the Inter-state Commerce Act to the contract in suit
 311 and being a question, as far as he is advised, which has never been passed upon by any of the higher Courts of this State.

Affiant further states that this application is not made for delay but that an opportunity may be had to prepare a proper brief in this cause.

ALBERT SALZENSTEIN.

Subscribed and sworn to before me this 1st day of June A. D. 1908.

[SEAL.]

EDWARD F. IRWIN,

Notary Public.

And be it Remembered that afterwards to-wit on the 3rd day of June A. D. 1908, it being one of the days of the said May Term A. D. 1908 of the said Appellate Court, certain proceedings were had in said Court in said cause and entered of record in the words and figures following, to-wit:

No. 45.

N. T. KIRBY, Appellee,

C. & A. R. R. Co., Appellant.

Appeal from Sangamon.

And now on this day come again the said parties by attorneys and the court being now sufficiently advised in the premises it is ordered

by the court that the motion heretofore made by appellee for extension of time to file briefs be and the same is hereby allowed and ten days extension of time is granted.

312 And Be It Further Remembered, that afterwards, to-wit: on the 16th day of June A. D. 1908, it being one of the days of said May Term, A. D. 1908, of said Appellate Court, certain proceedings were had in said Court, and entered of record in the words and figures following, to-wit:

No. 45.

N. T. KIRBY, Appellee,

vs.

CHICAGO & ALTON R. R. Co., Appellant.

Appeal from Sangamon.

On this day come the said parties, by their attorneys, and this being one of the days set apart for the call of the docket under the rules or orders of the Court for this term, and this cause coming now on to be heard, the appellant having entered motion to reverse the judgment and remand said cause, and for costs, and the appellee having entered motion to affirm the judgment herein and for costs and for procedendo, and said motions being taken under advisement for final hearing, and the Clerk reporting to the Court that said cause is now ready to be taken on the call of the docket, it is ordered by the Court that this cause be now submitted upon the Record, Abstracts, Briefs and Arguments filed, and to be filed herein under the rules or order of the Court; and it is further ordered by the Court that this cause be now taken under advisement for final hearing.

313 And Afterwards, to-wit: On the 24th day of November, in the year of our Lord one thousand nine hundred and eight an order was made by said Court in words and figures following, to-wit:

#45.

N. T. KIRBY, Appellee,

vs.

CHICAGO & ALTON RAILROAD COMPANY, Appellant.

Appeal from Sangamon.

On this day come again the said parties, and the Court having diligently examined and inspected, as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the Judgment

aforesaid, is there anything erroneous, vicious or defective, and that that record is no error: Therefore, it is considered by the Court that the motions heretofore made to Reverse the Judgment and Remand said cause for a new trial, be and the same are denied, and the motion heretofore made to affirm the Judgment herein, is allowed; and it is therefore ordered by the Court that the — aforesaid be affirmed in all things, and stand in full force and effect, notwithstanding the said matter and things therein assigned for error, and that motion for prodedendo be allowed. And it is further considered by the Court, that said Appellee recover of and from the said Appellant costs, by him in this behalf expended, and that he have execution therefor.

314 And afterwards to-wit on the 3rd day of December, A. D. 1908, comes the said Chicago & Alton R. R. Co. by appellant attorneys and present its petition in writing for an appeal from said judgment of affirmance in said cause, so entered as aforesaid to the Supreme Court of the State of Illinois, together with an affidavit of the solvency and sufficiency of the sureties proposed on the appeal bond, which said petition and affidavit are in the words and figures following to-wit:

STATE OF ILLINOIS,
Third District:

In the Appellate Court, November Term, 1908.

N. T. KIRBY, Appellee,
vs.

CHICAGO & ALTON RAILROAD COMPANY, Appellant.

Prayer for Appeal.

To the Honorable the Judges of said Court:

Your petitioner, the Chicago & Alton Railroad Company, appellant herein, prays an appeal in said cause to the Supreme Court of the State of Illinois and states that the judgment is of affirmance of a judgment of the circuit court of Sangamon county in an action of assumpsit for \$4200.00 which judgment of affirmance is of date November 24, 1908, and that the National Surety Company, a corporation organized by law to do business in the State of Illinois is proposed as surety on the bond herein and states that said surety is solvent and sufficient.

CHICAGO & ALTON R. R. CO.,
By PATTON & PATTON,
Its Attorneys.

315 STATE OF ILLINOIS,
Sangamon:

William L. Patton being first duly sworn on oath states that he has read the foregoing petition and that the matters therein stated are true to the best of his information knowledge and belief.

WILLIAM L. PATTON.

Subscribed and sworn to before me this 2nd day of December,
A. D. 1908.

WILLIAM C. HIPPARD,
Clerk App. Court, 3rd Dist.

And afterwards to-wit on the 4th day of December, A. D. 1908, there was filed in the office of the clerk of said Appellate Court an order made by said Court allowing said appeal in said cause as prayed which said order is in the words and figures following to-wit:

No. 45.

N. T. KIRBY, Appellee,

vs.

CHICAGO & ALTON R. R. Co., Appellant.

Appeal from Sangamon.

And now on this day come again the appellant in the above entitled cause, by attorneys, and the court having carefully considered the petition for an appeal to the Supreme Court from the judgment herein entered together with the affidavit of solvency and sufficiency of the surety proposed on an appeal bond, submitted at a former day of this term, and being now sufficiently advised of and concerning the premises: It is ordered by the court that the prayer of said petition be allowed and an appeal is hereby granted in said cause to the Supreme Court of this State upon appellant filing an appeal bond in the office of the Clerk of this court in 20 days in the penal sum of five thousand dollars with National Surety Company as surety.

316 And afterwards, to-wit, on the 11th day of December, A. D. 1908, there was filed in the office of the Clerk of said Appellate Court, a certain appeal bond in said cause, which said appeal bond is in the words and figures following, to-wit:

Know all men by these presents, that we, Chicago and Alton Railroad Company, as principal, and National Surety Company, as surety, of the County of Cook and State of Illinois, are held and firmly bound unto Nathaniel T. Kirby, also of the same County and State, in the penal sum of Five Thousand Dollars, lawful money of the United States, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly, severally and firmly by these presents.

Witness our hands and seals this 7th day of December, A. D. 1908.

The condition of the above obligation is such, that, whereas, the said Nathaniel T. Kirby did on the 22nd day of February, A. D. 1908, in the Circuit Court of Sangamon County, in the State aforesaid, and of January Term thereof, A. D. 1908, recover a judgment against the said Chicago and Alton Company for the sum of Four Thousand two hundred (4200) Dollars and — Cents, beside costs of suit, from which said judgment of the Circuit Court of Sangamon County the said Chicago and Alton Railroad Company prayed for and obtained an appeal to the Appellate Court within and for the Third District of said State; and, whereas, the said Appellate Court did, on the 24th day of November, A. D. 1908, and at the November Term thereof, A. D. 1908, affirm the judgment of the Circuit Court aforesaid, and did render judgment against the above bounden Chicago and Alton Railroad Company for costs of suit, from which order of affirmance and judgment of the said Appellate Court the said — — has prayed for and obtained an appeal to the Supreme Court of the State of Illinois.

Now, therefore, if the said Chicago and Alton Railroad Company shall duly prosecute its said appeal, with effect, and moreover, pay the amount of the judgment, costs, interest and damages rendered and to be rendered against it in case the said judgment shall be affirmed in said Supreme Court, then the above obligation to be void; otherwise to remain in full force and virtue.

**CHICAGO & ALTON RAILROAD
COMPANY.**

By GEO. H. ROSS, *V. President.*

[SEAL.]

[SEAL.]

Attest:

H. E. R. WOOD,
Ass't Secretary.

NATIONAL SURETY COMPANY. [SEAL.]

By E. A. ST. JOHN,

Resident Vice President. [SEAL.]

Approved:

ALFRED L. FRASER,
Resident Ass't Secretary.

317 I, William C. Hippard, Clerk of the Appellate Court for the Third District of the State of Illinois, do hereby certify that the foregoing is a true and complete record of the proceedings in said Court in a certain cause wherein Chicago & Alton R. R. Co. was appellant and N. T. Kirby was appellee, as the same appears of record and on file in my office.

In testimony whereof, I hereunto set my hand and the seal of said Appellate Court, at Springfield, this 12th day of December, A. D. 1908.

[SEAL.]

WILLIAM C. HIPPARD,
Clerk Appellate Court, 3d District.

Assignment of Error.

And now comes the Chicago & Alton Railroad Company by its attorneys and shows to the Court here that there is manifest error in the record herein in this, that is to say:

1. The Trial Court erred in admitting on the trial improper evidence offered by appellee.

2. The Trial Court erred in improperly overruling various motions made by appellant during the *cause* of the trial to exclude from the jury improper evidence theretofore offered by appellee and admitted by the Court.

3. The Trial Court erred in improperly refusing to admit proper evidence offered by appellant.

4. The Trial Court erred in improperly qualifying the effect of evidence offered by and admitted on behalf of appellant by oral statements to the jury concerning the same.

5. The Trial Court erred in improperly refusing at the close of all the evidence to instruct the jury to find the issues for the appellant.

6. The Trial Court erred in improperly denying the motion made by appellant at the close of all the evidence to exclude the evidence from the jury and to instruct the jury to find the issues for the appellant, and in improperly refusing the written instruction to the jury presented therewith, to find the issues for appellant.

7. The Trial Court erred in overruling appellant's motion to set aside the verdict and for a new trial.

8. The Trial Court erred in not granting appellant's motion to set aside the verdict and for a new trial.

319 9. The Trial Court erred in entering judgment on the verdict in favor of appellee and against appellant.

10. The trial Court erred in refusing to properly instruct the jury on motion of appellant and in refusing to give to the jury the instructions offered and asked by appellant, and each of them, being numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12.

11. The Trial Court erred in improperly instructing the jury on motion of appellee, and in improperly giving to the jury, the instructions offered and asked by appellee, and each of them, being numbered I, II and III.

12. Said Appellate Court erred in affirming the judgment of said Circuit Court of Sangamon County, the same court being the trial court.

13. Said Appellate Court erred in refusing to reverse said judgment of said Circuit Court.

14. Said Appellate Court erred in overruling and refusing to sustain the specifications of error and each of them, contained in the assignment of errors filed by appellant in said Appellate Court.

15. Said Appellate Court erred in that it failed and refused to sustain the errors and each of them, assigned by the appellant in said Appellate Court.

Wherefore, and for other good and sufficient reasons, apparent

on the face of the record, appellant prays that the judgment of the Appellate Court and of the said Circuit Court herein, be reversed.

PATTON & PATTON,
Attorneys for Appellant.

F. S. WINSTON, Esq.,
Of Counsel.

320 At a Supreme Court, Begun and Held at Springfield, on Tuesday, the Second Day of February, in the Year of Our Lord One Thousand Nine Hundred and Nine, Within and for the State of Illinois.

Present.—James H. Cartwright, Chief Justice; John P. Hand, Justice; Guy C. Scott, Justice; William M. Farmer, Justice; Alonzo K. Vickers, Justice; Orrin N. Carter, Justice; Frank K. Dunn, Justice; William H. Stead, Attorney General; Warren C. Murray, Bailiff.

Attest:

J. McCAN DAVIS, *Clerk.*

Be it remembered, to-wit, on the second day of February, A. D. 1909, the same being one of the days of the term of Court aforesaid, the following proceedings were by said Court had and entered of record, to-wit:

No. 6540.

N. T. KIRBY, Appellee,
vs.

CHICAGO & ALTON RAILROAD Co., Appellant.

Appeal Third District.

And now on this day comes appellant by counsel and moves the Court for leave to file abstracts and briefs instant, which motion is by the Court taken under advisement.

And afterwards, to-wit, on the third day of February, A. D. 1909, the same one of the days of the term of Court aforesaid the Court having duly considered the motion of appellant for leave to file abstracts and briefs herein instant, and being now fully advised in the premises grants the motion and continues this cause until next term of Court.

And afterwards, to-wit, on the fifth day of February, A. D. 1909, the following proceedings were by said Court had and entered of record, to-wit:

No. 6540.

N. T. KIRBY, Appellee,
vs.
CHICAGO & ALTON R. R. Co., Appellant.

Appeal Third District.

321 And now on this day comes appellee by counsel and moves the Court to set aside the order of continuance entered herein, which motion is by the Court taken under advisement.

And afterwards, to-wit, on the ninth day of February, A. D. 1909, the same being one of the days of the term of Court aforesaid the following proceedings were by said Court had and entered of record, to-wit:

No. 6540.

N. T. KIRBY, Appellee,
vs.
CHICAGO & ALTON RAILROAD COMPANY, Appellant.

Appeal Third District.

And now on this day the Court having duly considered the motion of appellee to set aside the order of continuance entered herein and being now fully advised in the premises overrules and denies the motion.

And the appellant also comes by counsel and moves the Court for leave to cite additional authorities, which motion is this day allowed by the Court.

322 At a Supreme Court, Begun and Held at Springfield, on Tuesday, the Sixth Day of April, in the Year of our Lord One Thousand Nine Hundred and Nine, Within and for the State of Illinois.

Present—James H. Cartwright, Chief Justice; John P. Hand, Justice; William M. Farmer, Justice; Orrin N. Carter, Justice; Guy C. Scott, Justice; Alonzo K. Vickers, Justice; Frank K. Dunn, Justice; William H. Stead, Attorney General; Warren C. Murray, Bailiff.

Attest:

J. McCAN DAVIS, *Clerk*.

And afterwards to-wit on the Sixteenth day of April A. D. 1909, the same being one the days of the term of Court aforesaid the following proceedings were by said Court had and entered of record to-wit:

N. T. KIRBY, Appellee,

vs.

CHICAGO & ALTON RAILROAD COMPANY, Appellant.

Appeal from Third District.

Now on this day come the parties hereto and this being one of the days set apart for the call of the docket under the rules of this Court, and it appearing to the Court that ———, appellant, hath filed herein a duly certified transcript of the record and proceedings of the Court below, together with printed abstracts thereof, and briefs and arguments of counsel in support of the errors assigned herein, and entered motion to reverse the judgment and remand said cause and for costs, and the said appellee, ———, having entered motion to affirm said judgment and for costs and procedendo, and said motions being taken under advisement for final hearing, and the Clerk of this Court reporting that said cause is now ready to be taken, and said cause ——— is here submitted for the consideration and judgment of the Court:

Therefore it is ordered by the Court that this cause be and the same is hereby taken under advisement.

324 At a Supreme Court, Begun and Held at Springfield, on Tuesday, the First Day of June, in the Year of Our Lord, One Thousand Nine Hundred and Nine, Within and for the State of Illinois.

Present—William M. Farmer, Chief Justice; James H. Cartwright, Justice; Alonzo K. Vickers, Justice; Frank K. Dunn, Justice; John P. Hand, Justice; Orrin N. Carter, Justice; William H. Stead, Attorney General; Warren C. Murray, Bailiff.

Attest:

J. McCAN DAVIS, *Clerk*.

Be it remembered, to-wit, on the Sixteenth day of June A. D. 1909, the same being one of the days of the term of Court aforesaid, the following proceedings were by said Court, had and entered of Record, to-wit:

No. 6540.

N. T. KIRBY, Appellee,

v.

CHICAGO & ALTON RAILROAD COMPANY, Appellant.

Appeal Third District.

And now on this day, this cause having been argued by counsel, and the Court having diligently examined and inspected, as well

the record and proceedings aforesaid, as the matter and things therein assigned for Error, and now being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid nor in the rendition of the Judgment aforesaid, is there anything erroneous, vicious or — defective, and that in that record there is no error: Therefore, it is considered by this Court that the Judgment aforesaid be Affirmed in all things, and stand in full Force and Effect, notwithstanding the said matters and things therein assigned for error. And it is further considered by the Court that the said Appellee recover of and from the said Appellant costs by him in this behalf expended, and that he have execution therefor.

325 At a Supreme Court, Begun and Held at Springfield, on Tuesday, the Fifth Day of October, in the Year of Our Lord One Thousand Nine Hundred and Nine, Within and for the State of Illinois.

Present—William M. Farmer, Chief Justice; James H. Cartwright, Justice; Alonzo K. Vickers, Justice; Frank K. Dunn, Justice; John P. Hand, Justice; Orrin N. Carter, Justice; George A. Cooke, Justice; William H. Stead, Attorney General; Warren C. Murray, Bailiff.

Attest:

J. McCAN DAVIS, *Clerk*.

Be it remembered to-wit on the Sixteenth day of October A. D. 1909 the same being one of the days of the term of Court aforesaid the following proceedings were by said Court had and entered of record to-wit:

No. 6540.

N. T. KIRBY, Appellee,

vs.

CHICAGO & ALTON RAILROAD COMPANY, Appellant.

Appeal Third District.

And now on this day the Court having duly considered the petition for rehearing filed herein and being now fully advised in the premises doth grant the prayer of the petition and orders a rehearing of this cause.

326 And afterwards, to-wit on the Twenty-sixth day of October A. D. 1909 the same being one of the days of the term of Court aforesaid the following proceedings were by said Court had and entered of record to-wit:

No. 6540.

N. T. KIRBY, Appellee,

vs.

CHICAGO & ALTON RAILROAD Co., Appellant.

Appeal Third District.

Now on this day come the parties hereto and this being one of the days set apart for the call of the docket under the rules of this Court, and it appearing to the Court that ———, appellant, hath filed herein a duly certified transcript of the record and proceedings of the Court below, together with printed abstracts thereof, and briefs and arguments of counsel in support of the errors assigned herein, and entered motion to reverse the judgment and remand said cause and for costs, and the said appellee, ———, having entered motion to affirm said judgment and for costs and procedendo, and said motions being taken under advisement for final hearing, and the Clerk of this Court reporting that said cause is now ready to be taken, and said cause on rehearing allowed is here submitted for the consideration and judgment of the Court:

Therefore it is ordered by the Court that this cause be and the same is hereby taken under advisement.

327 At a Supreme Court, Begun and Held at Springfield on Tuesday, the Seventh Day of December in the Year of Our Lord One Thousand Nine Hundred and Nine, Within and for the State of Illinois.

Present: William M. Farmer, Chief Justice; James H. Cartwright, Justice; Alonzo K. Vickers, Justice; Frank K. Dunn, Justice; John P. Hand, Justice; Orrin, N. Carter, Justice; George A. Cooke, Justice.

William H. Stead, Attorney General.

Warren C. Murray, Marshal.

Attest:

J. McCAN DAVIS, *Clerk*.

Be it remembered, that afterwards, to-wit, on the 22nd day of December, 1909, the opinion of the Court was filed in the words and figures following to-wit:

No. 6540.

N. T. KIRBY, Appellee,

v.

CHICAGO & ALTON RAILROAD Co., Appellant.

Error to — Appeal from Third District.

328 Docket No. 6540—Agenda 16—February, 1909.

NATHANIEL T. KIRBY, Appellee,

v.

CHICAGO AND ALTON RAILROAD COMPANY, Appellant.

PER CURIAM: This is an appeal by the Chicago and Alton Railroad Company from a judgment of the Appellate Court for the Third District affirming a judgment for the sum of \$4200 recovered by Nathaniel T. Kirby, the appellee, against the appellant, in the circuit court of Sangamon county, in an action of assumpsit to recover damages for the breach of an alleged special contract entered into by appellant with appellee, whereby appellant was obligated to transport a car-load of horses from Springfield, Illinois, to Joliet, Illinois, and to secure transportation for the car from that point to New York City over the lines of the Michigan Central Railroad Company.

The declaration, in one count, alleged, in substance, that on January 24, 1906, appellant, in consideration that appellee would ship a certain car-load of high-bred trotting horses over its road which he was intending to ship to New York City during that month to be sold at a sale of high-bred trotting and pacing horses at Madison Square Garden, promised appellee that said stock should be carried by it over its lines to Joliet, Illinois, and then over the lines of the Michigan Central Railroad Company by a fast stock train, known as the "Horse Special," to New York City, for the sum of \$170.60; that appellee, relying on said promises, on January 24, 1906, paid the said sum and delivered to appellant, for transportation, the said car-load of horses, and that it was received by appellant under the terms and agreements aforesaid, and that it thereby became the duty of appellant to carry said car-load of horses in accordance with the terms of said agreement, but that, wholly disregarding its duty in that behalf, appellant did not deliver said car-load of horses to the Michigan Central Railroad Company so that they could be carried on the Horse Special to New York City, but neglected and failed so to do, and by reason of such neglect and failure appellee was obliged to have them carried by a later train and by inferior and slower means of transportation, whereby said stock was delayed in transit more than forty-eight hours and reached the destination too late to be put in proper shape for exhibition and sale at said horse sale, and that by reason of such delay and inferior transportation all of said horses were damaged and depreciated in value and several of them became sick, etc.

329 Appellant interposed the general issue. A trial by jury was had, resulting in a verdict in favor of appellee for the amount of the judgment hereinbefore mentioned. At the close of all the evidence the motion of appellant for a peremptory instruction was denied.

The appellee was engaged in the business of developing horses for racing and carriage purposes in the city of Springfield, Illinois. Early in January of 1906 he decided to ship fourteen head of high-bred horses, ranging in value from \$200 to \$3500, to New York City, to be sold at a horse sale at Madison Square Garden, in that city, the latter part of that month. Upon learning of appellee's plans he was solicited by Mr. Connor, the ticket agent for the appellant at Springfield, to ship over appellant's road. Connor suggested to appellee that he would have W. P. Eggleston, the freight agent of appellant in that city, confer with him about rates, etc. Appellee objected to dealing with Eggleston, and Connor then proposed to send R. W. Stuttzman, appellant's live stock agent, to see him. Shortly thereafter Stuttzman called on appellee for the purpose of securing the business, and at that time appellee told Stuttzman that he had a lot of high-priced horses that he wanted to ship to New York by the fastest available trains; that he desired the shipment to go by way of Joliet in order to make connections at Lake with the Horse Special on the Michigan Central railroad, which left Chicago for New York on three days in each week. Stuttzman was unable to quote the rate on the car from Springfield to New York, and he, together with appellee, went to the office of Eggleston, who also at that time was unable to give the rate. In a day or two, however, Eggleston, upon the third application to him, telephoned appellee that the rate would be \$170.60, and appellee, with the understanding that connections would be made at Lake with the Horse Special, then directed Eggleston to order the car for January 24. A few days later Stuttzman informed appellee that he was shipping just at the right time, as the Horse Special left Chicago on Tuesday, Thursday and Saturday of each week, and that he would reach Joliet in time over appellant's line to make proper connection; that appellant would attend to having a transfer of the car made and guarantee to put him on the Horse Special.

On January 24, 1906, appellee was furnished with an Arms
330 Palace Horse Car, in which his horses were loaded during the afternoon. When he went to the freight office to get his shipping contract, shortly before the train containing his car left for Joliet, neither Eggleston nor Stuttzman was there. A bill clerk of appellant, named Byers, was then in the office. Byers told appellee that the contract was already prepared and ready for his signature, and passed a document partly through the wire grating for appellee to sign, and he, without reading, signed. In response to appellee's inquiry if all arrangements had been made at Joliet, Byers replied that the matter had been attended to, and exhibited the way-bill indicating that the horses were to be carried on the Horse Special. The document signed by appellee contained provisions limiting the common law liability of appellant. The amount charged appellee

by appellant was the regular tariff rate of sixty-five cents per hundred on a minimum of 20,000 pounds for horses shipped under the conditions of the so-called "uniform bill of lading" and the rental of the Arms car.

Appellee accompanied the shipment and the car reached Joliet on the morning after it left Springfield. Upon its arrival there it was switched to the tracks of the Michigan Central railroad, where it remained until about six o'clock that evening, when it was taken from there to Lake by the employees of the latter company too late for the Horse Special, but about midnight it was attached to a meat and provision train on that road and carried to New York. This train ran on a much slower schedule than the Horse Special, and arrived in New York City on January 29, thirty-six hours or more later than the Horse Special to which appellee expected his car to be attached at Lake. The car reached Joliet and was switched into the Michigan Central yards in time to have been taken by the latter company to Lake, where it could have been attached to the Horse Special if proper arrangements had been made by appellant with the Michigan Central company to have the car attached to that train, but no such arrangements had been made, and appellee, after he reached Joliet, was unable to effect the connection.

Appellee had arranged to have the horses sold at a great public auction at Madison Square Garden on the 30th, and when the car reached New York City the day before, a number of the horses were ill, and on account of the delay in transit he was unable to properly prepare and exhibit his horses before they were offered for sale, and when sold some of them were still sick, and they were otherwise in such condition, consequent upon the delay, that their value was materially lessened.

331 It is contended by appellant that the court erred in denying its motion to direct a verdict.

It is first contended by appellant that the motion for a directed verdict should have been allowed for the reason that "there was no evidence fairly tending to prove a contract for the Joliet connection with the Horse Special made by an agent having authority to make such contract." The evidence most favorable to appellee shows that he made a contract with Stuttsman, the live stock agent of appellant, by which the car containing his horses was to be taken to Joliet and transferred to the Michigan Central and to be by that road taken from Lake to New York City on the Horse Special, provided the rate was satisfactory. Stuttsman and Kirby then called on Eggleston, the freight agent of appellant, to ascertain what the rate would be. Eggleston stated that he was not able to quote the rate at that time but would get it. Upon the third application made by Kirby, Eggleston quoted the ordinary rate to New York City and Kirby accepted. Kirby went to sign the contract on the day on which he shipped his horses. At the time he signed the instrument which Byers, the bill clerk, presented to him for signature, he asked whether the necessary arrangements had been made at Joliet. The clerk answered in the affirmative and exhibited the way-bill showing that the car was to be taken by appellant to Joliet and showing the

consignees to be "Pasig, Tipton & Co.," New York City, N. Y. On the face of the bill appeared these words: "In care of fast horse train out of Chicago, on M. C. Ry. about 3 P. M. Thursday, January 25, 1906." Kirby then signed the document. We think, under the circumstances, the way-bill should be regarded as a part of the contract, and it, with the other proof just referred to, clearly shows that the contract was made as Kirby contends.

It is insisted, however, that neither Stuttsman, Eggleston nor Byers had any authority from appellant to make a contract by which the appellant was obligated to secure the shipment of these horses by the Horse Special over the Michigan Central lines. Stuttsman testified that it was his business to induce shippers to send their live stock over the lines of appellant but that he could offer no reduced rate; that what he did offer "was better service and quicker connections." It was an offer of this character which induced

332 Kirby to make the contract, as he had already been offered precisely the same rate by other carriers. After having made the arrangement with Stuttsman for "better service and quicker connections," the freight agent fixed the rate, the billing department billed the car, and the operating department of appellant started the car on its journey in accordance with the contract originally made with Stuttsman. If it can be said that Stuttsman did not have the authority to make this contract, and if it can be said,—which we very much doubt,—that appellant did not hold him out as having such authority, we still think it entirely clear that appellant ratified Stuttsman's act in entering into the contract by billing the car and moving it to Joliet pursuant to the terms of that agreement.

The instrument signed by Kirby contained a number of provisions limiting the common law liability of the appellant in such manner that no recovery could be had in this case if appellee was bound by those provisions. The evidence shows that the instrument, already prepared, was presented to Kirby by the bill clerk and Kirby was directed to "sign there;" that he signed without reading the contract and without knowledge of its contents, because, as he says, he knew the company would not take his horses if he did not sign. Irrespective of this document there was evidence, as above indicated, showing that appellant was bound to transport these horses and have the car put in the Horse Special on the Michigan Central lines. Whether appellee knowingly assented to the provisions contained in the written instrument which he signed, whereby the common law liability of appellant was limited, was upon this record a question of fact to be finally determined by the Appellate Court. *Chicago and Northwestern Railway Co. v. Calumet Stock Farm*, 194 Ill. 9; *Cleveland, Cincinnati, Chicago and St. Louis Railway Co. v. Patton*, 203 id. 376; *Wabash Railroad Co. v. Thomas*, 222 id. 337.

It is next contended that the contract upon which recovery was had was for a special service not provided for by the published tariffs of appellant, and if made was void for the reason that it was in violation of the Inter-State Commerce act, prohibiting discrimination

among shippers. The basis of this contention is found in the fact that the contract as counted upon was to ship by a certain train over the Michigan Central lines, not under conditions of the "uniform bill of lading," while the rate was the ordinary rate for the shipment of horses from Springfield to New York under conditions of that bill of lading and by such trains as the carriers might select. The theory is, that the agreement to ship by the Horse Special was a discrimination in favor of Kirby. The Inter-State Commerce act (3 Comp. Stat. U. S. p. 3155,) requires a carrier to charge the same sum against each shipper where "a like and contemporaneous service" is rendered to each, and makes a discrimination as to rates unlawful. It also provides for the making and publishing of schedules of rates, which shall contain a classification of freight and any rules and regulations which in anywise change, affect or determine any part or the aggregate of the rates. By the amendatory act of February 19, 1903, (U. S. Comp. Stat. Supp. of 1903, p. 363,) it is provided: "It shall be unlawful for any person, persons or corporation to offer, grant or give, or to solicit, accept or receive any rebate, concession, or discrimination in respect of the transportation of any property in inter-state or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereto, whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereto, or whereby any other advantage is given or discrimination is practiced." It is the provision just quoted which it is contended inhibited the making of a contract by which the horses were to go on any particular train.

The further contention as to the illegality of the contract is this: The rate paid was that fixed by the schedules for property shipped subject to what is termed "uniform bill of lading conditions," and the schedules provided that if property be shipped not subject to those conditions the rate shall be higher, and fixes the amount of the increase. If the property was shipped pursuant to the contract counted upon, and appellee was not bound by the provisions of the written instrument signed by him purporting to limit the common law liability of appellant, then it was not shipped subject to "uniform bill of lading conditions." It appears that the appellant has complied with the provisions of the act just referred to, with reference to filing and publishing joint tariff rates. These rates could be ascertained at the Springfield freight office of appellant by consulting, first, a printed volume containing one hundred and thirty-two pages, known as the "Official classification;" second, a printed pamphlet of eleven pages, known as "Joint through freight tariff;" and third, another document known as "List of stations taking percentage rate basis." While the Horse Special was operated for the express purpose of carrying animals designed for the eastern markets and ran but three times a week, there is nothing in these schedules from which it can be ascertained under what condition the shipper may have his stock carried by that

train or from which it may be ascertained that the rate for such service as is rendered by that train would be other than the rate paid by appellee. It follows, if appellant's contention be correct, that while it has a traffic arrangement with the Michigan Central road by which horses shipped in car-load lots over its lines may be carried by the Michigan Central road to New York, no method has been provided whereby the shipper may be certain that he will have his horses carried by that train on the Michigan Central lines, which is specially designed to render the precise service the shipper desires.

In the case at bar we think it clear that the railroad company had a right to agree to connect with the Horse Special, and in doing so it did not agree to perform such a special service as to in any way violate the Inter-State Commerce act. The agreement to carry appellee's horses from Joliet to New York on the Horse Special was a legitimate means of procuring business, and there is nothing in the record to show that every other shipper was not entitled to the same privilege and would have been accorded it upon request. Moreover, the evidence tends to show affirmatively that other railroads were ready to accord the same special service to appellee at the quoted and contract rates agreed upon between him and appellant. The Supreme Court of the United States, in *Texas and Pacific Railway Co. v. Inter-State Commerce Commission*, 162 U. S. 197, held that all preferences and advantages are not prohibited by the Inter-State Commerce act, and quoted with approval the rule announced by Justice Jackson in the case of *Inter-State Commerce Commission v. Baltimore and Ohio Railroad Co.*, 43 Fed. Rep. 37, (which was affirmed in 145 U. S. 263,) as follows: "Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate so as to give undue preference or advantage or subject to undue prejudice or disadvantage persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits." See, also, *Southern Pacific Railway Co. v. Inter-State Commerce Commission*, 200 U. S. 536.

We are unable to see that there is anything in the agreement to ship by Joliet so as to connect with the Horse Special violative of the provisions of the Inter-State Commerce act, as interpreted by the Federal courts.

Passing that question, however, appellant's position is that, the contract being void, appellee is without right to recover anything on account of its violation, and it is urged in this connection that appellee is conclusively presumed to have notice of the provisions of the Inter-State Commerce act, and to know, not only that he contracted for a lower rate than that which he was entitled to, but also that he contracted for a special service in shipment by a designated train to which he was not entitled and for

which appellant could not contract without violation of the act last referred to. Whatever the presumption may be, it is certain from the evidence that appellee did not actually know either that he was obtaining a rate that was unlawful because it was too low, or that he was contracting for a special privilege which he could not lawfully obtain. It is also certain that the schedules showing the rates are so complicated and the rates fixed are so hedged about with conditions and subject to such exceptions that no man not entirely familiar with such schedules could within any reasonable length of time ascertain from them so simple a thing as the rate per car-load lot for the shipment of horses from Springfield, Illinois, to New York City. The freight agent of appellant, although he had these schedules at hand, was unable to give the desired information until the third application was made to him. Schedules so prepared are of little real value to the ordinary shipper. Practically, they leave him at the mercy of the agent of the carrier. It has been frequently held in other jurisdictions that the contract for an inter-State shipment is void as to the rate, under the provisions of the Inter-State Commerce act, if the rate fixed is less than the rate charged other shippers for a like and contemporaneous service, and that even where the carrier has contracted for the lower rate, it may collect the rate fixed by its schedules filed and published pursuant to the provisions of the law. In *Illinois Central Railroad Co. v. Seitz*, 336 214 Ill. 350, however, we expressed a view somewhat inconsistent with that holding in reference to the right of a shipper to whom a rate had been made for an intra-State shipment which it was contended was lower than should have been made to him under the provisions of our own statute designed to prevent extortion and unjust discrimination by carriers. Whether a shipper who makes a contract for an inter-State shipment at a rate that is discriminatory or which provides for a privilege not ordinarily given may recover for a failure of the carrier to comply with its contract to safely carry, where he was without knowledge of the unlawful feature of the contract, is a question not determined by the holdings in other jurisdictions just noticed. It seems clear to us that the shipper entered into this contract in good faith and without actual knowledge of its claimed unlawful character, and even if the contract were construed to be void as to the rate fixed, and even if the company may be permitted to collect the proper rate, still the rights of the shipper under the contract are not in other respects different from what they would have been if the contract had been free from the illegality mentioned. This view finds support in the case of *Merchants' Cotton Press and Storage Co. v. Insurance Co. of North America*, 151 U. S. 368. There it was charged that special rates, rebates or drawbacks had been allowed and that the contract was for that reason void in every respect. The court held that the Inter-State Commerce act made the agreement as to the special rates, rebates or drawbacks void but did not otherwise invalidate the contract of affreightment. And in the late case of *Standard Oil Co. v. United States*, 164 Fed. Rep. 376, the United States Circuit Court of Appeals held that the ordinary shipper,

under any reasonable view of the Inter-State Commerce act, was not bound to cipher out, before he could safely put his property into commerce, all the confusing papers and figures that generally make up the tariff sheet. That case was, it is true, a criminal case, but we see no reason why the rule there announced should not apply in a case like this.

We do not regard the cases relied upon by appellant as in point.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

337 At a Supreme Court, Begun and held at Springfield on Tuesday, the Seventh day of December in the year of our Lord one Thousand Nine hundred and nine, within and for the State of Illinois.

Present—William M. Farmer, Chief Justice; James H. Cartwright, Justice; Alonzo K. Vickers, Justice; Frank K. Dunn, Justice; John P. Hand, Justice; Orrin N. Carter, Justice; George A. Cooke, Justice; William H. Stead, Attorney General; Warren C. Murray, Marshal.

Attest:

J. McCAN DAVIS, *Clerk*.

Be it remembered, to-wit, on the Twenty-second day of December A. D. 1909, the same being one of the days of the term of Court aforesaid, the following proceedings were by said Court, had and entered of Record, to-wit:

No. 6540.

N. T. KIRBY, Appellee,

v.

CHICAGO & ALTON RAILROAD Co., Appellant.

Appeal Third District.

And now on this day, this cause having been argued by counsel, and the Court having diligently examined and inspected, as well the record and proceedings aforesaid, as the matter and things therein assigned for Error, and now being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid nor in the rendition of the Judgment aforesaid, is there anything erroneous, vicious or defective, and that in that record there is no error: Therefore, it is considered by this Court that the Judgment aforesaid be Affirmed in all things, and stand in full Force and Effect, notwithstanding the said matters and things therein assigned for error. And it is further considered by the Court that the said Appellee recover of and from the said Appellant costs by him in this behalf expended, and that he have execution therefor.

338

Authentication of Record.

SUPREME COURT,
State of Illinois, ss:

I, J. McCan Davis, Clerk of said Court, Do Hereby Certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of N. T. Kirby, appellee, vs. Chicago & Alton Railroad Company, appellant, and also of the opinion of the Court rendered therein as the same now appear on file in my office.

In Testimony Whereof I have hereunto set my hand and affixed the seal of the said Supreme Court at Springfield this 28th day of February A. D. 1910.

[Seal of the Supreme Court, State of Illinois. Aug. 23, 1818.]

J. McCAN DAVIS,
Clerk Supreme Court of Illinois.

339

Be it remembered to-wit that on the 2nd day of February A. D. 1910, there was duly filed by the appellant Chicago & Alton Railroad Company, in the office of the Clerk of the Supreme Court of Illinois, a petition for writ of error with assignments of error and prayer for reversal from the Supreme Court of the United States to the Supreme Court of Illinois addressed to the Hon. William M. Farmer, Chief Justice of the Supreme Court of Illinois, with the endorsement by the Chief Justice upon the said petition allowing said writ of error, which documents are in words and figures as follows to-wit:

340

Original.

In the Supreme Court of the United States and in the Supreme Court of the State of Illinois.

In the Supreme Court of Illinois.

No. 6540.

NATHANIEL T. KIRBY, Appellee, Now Defendant in Error,
vs.
CHICAGO & ALTON RAILROAD COMPANY, Appellant, Now Plaintiff
in Error.

Petition for Writ of Error.

To the Honorable the Chief Justice of the Supreme Court of the State of Illinois:

The petitioner, the Chicago & Alton Railroad Company, respectfully shows that on the 22nd day of December, A. D. 1909, the Supreme Court of Illinois entered judgment herein in favor of the

appellee, (now defendant in error) and against appellant, (now plaintiff in error), which said judgment was in the words and figures following, as will appear by reference to the records and proceedings in said cause:

341 At a Supreme Court, Begun and held at Springfield on Tuesday, the Seventh day of December in the year of our Lord one Thousand Nine hundred and nine, within and for the State of Illinois.

Present—William M. Farmer, Chief Justice; James H. Cartwright, Justice; Alonzo K. Vickers, Justice; Frank K. Dunn, Justice; John P. Hand, Justice; Orrin N. Carter, Justice; George A. Cooke, Justice.

William H. Stead, Attorney General.

Warren C. Murray, Marshal.

Attest:

J. McCAN DAVIS, *Clerk*.

Be it remembered, to-wit, on the Twenty-second day of December A. D. 1909, the same being one of the days of the term of Court aforesaid, the following proceedings were by said Court, had and entered of Record, to-wit:

No. 6540.

N. T. KIRBY, Appellee,

vs.

CHICAGO & ALTON RAILROAD COMPANY, Appellant.

Appeal from Third District.

And now on this day, this cause having been argued by counsel, and the Court having diligently examined and inspected, as well the record and proceedings aforesaid, as the matter and things therein assigned for Error, and now being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid nor in the rendition of the judgment aforesaid, is there anything erroneous, vicious or defective, and that in that record there is no error: Therefore, it is considered by this Court that the judgment aforesaid be affirmed in all things, and stand in full Force and Effect, notwithstanding the said matters and things therein assigned for error. And it is further considered by the Court that the said Appellee recover

342 of and from the said Appellant costs by him in this behalf expended, and that he have execution therefor.

I, J. McCan Davis, Clerk of the Supreme Court of the State of Illinois, Do hereby Certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled Cause of Record in my office.

In testimony whereof, I have set my hand and affixed the seal of the said Supreme Court at Springfield, this Twenty-Fifth day of January in the year of Our Lord one thousand nine hundred and ten.

[SEAL.]

J. McCAN DAVIS,
Clerk of the Supreme Court.

343 That prior to the entering of said judgment, on the 16th day of June, A. D. 1909 an opinion had been filed in said cause, by this Court affirming the judgment of the Appellate Court of the Third District of the State of Illinois in said cause, a copy of which opinion is hereto attached, marked Exhibit 1, and thereafter on the 26th day of June A. D. 1909, a petition for rehearing was filed in said cause by appellant (now plaintiff in error) in said cause, a copy of which petition for rehearing is hereto attached, marked Exhibit 2.

That thereafter a re-hearing in said cause was granted by said Supreme Court of Illinois by order entered on the 16th day of October, A. D. 1909, and a re-argument was had in said cause, and thereafter on said 22nd day of December, A. D. 1909, the aforesaid judgment was entered in said cause and an opinion was then and there filed by said Court, a copy of which last mentioned opinion is attached hereto and marked Exhibit 3.

And appellant, your petitioner respectfully shows that there was a judgment in said cause in the Circuit Court in and for the County of Sangamon in the State of Illinois in favor of Appellee, (now defendant in error) and against your petitioner for the sum of Four thousand two hundred dollars and costs of suit, which said judgment, upon appeal to the Appellate Court of the Third District of the State of Illinois was affirmed by said Court, and upon further appeal from the judgment of said Appellate Court to the Supreme Court of the State of Illinois, was affirmed as aforesaid by said last named Court.

And your petitioner further respectfully shows that the said Supreme Court of the State of Illinois is the highest court of the State of Illinois in which a decision in said cause could be had.

And your petitioner claims the right to remove said judgment to the Supreme Court of the United States, by writ of error under the Statutes of the United States authorizing writs of error to State Courts, inasmuch as in said judgment of said Supreme Court
344 of Illinois and the proceedings in said cause, certain errors were committed to the prejudice of petitioner, all of which will more in detail appear from the assignment of errors which is filed with this petition.

And because by the said judgment of said Supreme Court of Illinois there was denied to your petitioner a title, right, privilege or immunity claimed by your petitioner in the proceedings in said cause under the Constitution of the United States and under a statute of the United States and an authority exercised under the United States.

And because your petitioner claimed in said cause that the alleged contract set forth in the declaration in said cause was void as being

in violation of a statute of the United States, that is to say, in violation of the Act of Congress of February 4th, 1887, and the amendments thereto known as the "Inter-state Commerce Act," or the "Act to Regulate Commerce," and of the Act of February 19th, 1903, which said claim of a right, title or immunity under said Acts of Congress and the amendments thereto was denied to your petitioner by said judgment of said Supreme Court of the State of Illinois.

Wherefore, your petitioner claims and says that by a final judgment in a suit in the highest Court of the State of Illinois in which a decision in said suit could be had, there was a right, title, privilege or immunity which was specially set up and claimed under the Constitution of, and under a statute of the United States by your petitioner, and the decision of said Court was against such right, title, privilege or immunity which was so specially set up and claimed by your petitioner under such Constitution and such Statute, and wherefore and in accordance with the statute in such case made and provided therefor, your petitioner prays that a writ of error may issue in this behalf out of the Supreme Court of the United States, for the correction of the errors, and assignment whereof is filed with this petition, and that a transcript of the record, proceedings and files and papers in this cause, duly authenticated may be sent to the Supreme Court of the United States.

345 And your petitioner prays for the allowance of a citation and supersedeas in due form of law.

And your petitioner will ever pray, etc.

CHICAGO & ALTON RAILROAD COMPANY,
Petitioner, Formerly Appellant in said Cause,
and Now Plaintiff in Error.

By PATTON & PATTON,
Its Attorneys.
SILAS H. STRAWN,
Of Counsel.

346 In the Supreme Court of the United States and in the Supreme Court of the State of Illinois.

In the Supreme Court of Illinois.

No. 6540.

NATHANIEL T. KIRBY, Appellee, Now Defendant in Error,
vs.
CHICAGO & ALTON RAILROAD COMPANY, Appellant, Now Plaintiff
in Error.

*Assignment of Errors in Supreme Court United States and Prayer
for Reversal.*

And now comes the plaintiff in error in said cause and in connection with its petition for a writ of error out of the Supreme Court

of the United States, says that in the record and proceedings in said cause in the Supreme Court of Illinois, there is manifest error, and makes the following assignment of said errors which occurred in the hearing of said cause in the Supreme Court of Illinois, that is to say:

I.

The Supreme Court of Illinois erred in affirming the judgments of the Appellate Court and the Circuit Court of Sangamon County.

II.

The Supreme Court of Illinois erred in not reversing the said judgments of the Appellate Court, and the said Circuit Court.

III.

The Supreme Court of Illinois erred in holding that the contract set forth in the declaration was a valid contract.

IV.

The Supreme Court of Illinois erred in refusing to hold said contract void as being a contract in violation of the Act of Congress of February 4th, 1887, and the amendments thereto, commonly called the "Interstate Commerce Act," or the "Act to regulate Commerce."

V.

The Supreme Court of Illinois erred in affirming the said judgment enforcing a contract which was void as being in contravention and violation of the Act of Congress of February 4th, 1887, entitled "An Act to Regulate Commerce" as amended by the Act of March 2nd, 1889, and in contravention and violation of the Act of February 19th, 1903, entitled "An Act to Further Regulate Commerce With Foreign Nations and Among the States."

VI.

The Supreme Court of Illinois erred in its construction and application of certain clauses and sections of a statute of the United States, that is to say clauses and sections of the said Act of February 4, 1887, as amended by said Act of March 2nd, 1889, and of said Act of February 19th, 1903, and erred in denying to plaintiff in error a right, title, privilege or immunity specially set up or claimed under such clauses and sections to the great damage of the plaintiff in error.

VII.

The Supreme Court of Illinois erred in holding that the alleged contract was not invalid in that it was, if made, a violation of the said Act of Congress and amendments, and particularly a violation of Sections two, three, six and ten of the Act of February 4th, 1887,

entitled "An Act to Regulate Commerce" as amended by the Act of March 2nd, 1889 (3 U. S. Compiled Statutes pages 3155, 3156, 3157, 3158, 3159, 3160, 3161), and of Section One of the Act of February 19, 1903, being entitled "An Act to Further Regulate Commerce With Foreign Nations and Among the States."

(32 Stat. 847, 1903 Supp. U. S. Compiled Statutes pages 363 and 364.)

VIII.

The Supreme Court of Illinois erred in refusing to hold that said contract was invalid as being in violation of said Acts and sections thereof.

IX.

348 The Supreme Court of Illinois erred in refusing to hold that said contract was discriminatory and unlawful under said Acts and sections thereof.

X.

The Supreme Court of Illinois erred in holding that the defendant in error was not bound by the terms and provisions of the "Official Classification," "Joint Through Tariff," and "List of Stations Taking Percentage Rate Bases."

XI.

The Supreme Court of Illinois erred in holding that the plaintiff in error had a right, under the evidence in the case, to agree to carry the horses and connect with the "Horse Special."

XII.

The Supreme Court of Illinois erred in holding that the alleged agreement to carry the horses and connect with a particular train via Joliet at the tariff rate, was not an agreement to perform a special service not provided for by the published rate and tariff.

XIII.

The Supreme Court of Illinois erred in holding that there was nothing in the alleged contract to ship by Joliet so as to connect with the Horse Special, violative of the said Acts and sections thereof as interpreted by the Supreme Court of the United States.

XIV.

The Supreme Court of Illinois erred in holding that if the defendant in error entered into the said contract in good faith and without actual knowledge of its unlawful character, and even if the contract were construed to be void as to the rate fixed, and even if the plaintiff in error might be permitted to collect the proper rate, still the rights of the defendant in error under the contract

are not in other respects different from what they would have been if the contract had been free from the illegality mentioned, that is to say the illegality of the rate made.

XV.

349 The Supreme Court of Illinois erred in holding that the defendant in error was not presumed to have knowledge of the provisions of the said Acts and sections thereof, and of the provisions of the "Official Classification," Joint Through Freight Tariff" and "List of Stations Taking Percentage Rate Bases."

XVI.

The Supreme Court of Illinois erred in holding that defendant in error was not presumed to know that he contracted for a lower rate than that to which he was lawfully entitled, and that he contracted for a special service in shipment by a designated train to which he was not lawfully entitled and for which plaintiff in error and defendant in error could not contract without violation of the said Acts and sections thereof.

XVII.

The Supreme Court of Illinois erred in its construction and application of the law with reference to said Acts and sections thereof as hitherto declared and announced by the Supreme Court of the United States.

XVIII.

The Supreme Court of Illinois erred in that the judgment aforesaid given was given for the said Nathaniel T. Kirby against the said Chicago & Alton Railroad Company, whereas, by the law of the land the said judgment ought to have been given for the said Chicago & Alton Railroad Company.

Wherefore the plaintiff in error prays that the judgment of the Supreme Court of Illinois, affirming the judgment of the Appellate Court for the Third District of Illinois, which affirmed the judgment of the Circuit Court of Sangamon County in the State of Illinois may be reversed, annulled and in all things set aside, and that the plaintiff in error may be restored to all things which it has lost by occasion of the said judgment.

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EXHIBIT 1.

Mr. Justice Scott delivered the opinion of the court:

It is first contended by appellant that the motion for a directed verdict should have been allowed for the reason that "there was no evidence fairly tending to prove a contract for the Joliet connection with the Horse Special made by an agent having authority to make such contract." The evidence most favorable to appellee shows that he made a contract with Stuttzman, the live stock agent of appellant, by which the car containing his horses was to be taken to Joliet and transferred to the Michigan Central and to be by that road taken from Lake to New York City on the Horse Special, provided the rate was satisfactory. Stuttzman and Kirby then called on Eggleston, the freight agent of appellant, to ascertain what the rate would be. Eggleston stated that he was not able to quote the rate at that time but would get it. Upon the third application made by Kirby, Eggleston quoted the ordinary rate to New York City and Kirby accepted. Kirby went to sign the contract on the day on which he shipped his horses. At the time he signed the instrument which Byers, the bill clerk, presented to him for signature, he asked whether the necessary arrangements had been made at Joliet. The clerk answered in the affirmative and exhibited the way-bill showing that the car was to be taken by appellant to Joliet and showing the consignees to be "Pasig, Tipton & Co.," New York City, N. Y. On the face of the bill appeared these words: "In care of fast horse train out of Chicago on M. C. Ry. about 3 P. M. Thursday, January 25, 1906." Kirby then signed the document. We think, under the circumstances, the way-bill should be regarded as a part of the contract, and it, with the other proof just referred to, clearly shows that the contract was made as Kirby contends.

It is insisted, however, that neither Stuttzman, Eggleston nor Byers had any authority from appellant to make a contract by which the appellant was obligated to secure the shipment of these horses by the Horse Special over the Michigan Central lines. Stuttzman testified that it was his business to induce shippers to 351 send their live stock over the lines of appellant but that he could offer no reduced rate; that what he did offer "was better service and quicker connections." It was an offer of this character which induced Kirby to make the contract, as he had already been offered precisely the same rate by other carriers. After having made the arrangement with Stuttzman for "better service and quicker connections" the freight agent fixed the rate, the billing department billed the car, and the operating department of appellant started the car on its journey in accordance with the contract originally made with Stuttzman. If it can be said that Stuttzman did not have the authority to make this contract, and if it can be said,—which we very much doubt,—that appellant did not hold him out as having such authority, we still think it entirely clear that appellant ratified Stuttzman's act in entering into the contract by billing

the car and moving it to Joliet pursuant to the terms of that agreement.

The instrument signed by Kirby contained a number of provisions limiting the common law liability of the appellant in such manner that no recovery could be had in this case if appellee was bound by those provisions. The evidence shows that the instrument, already prepared, was presented to Kirby by the bill clerk and Kirby was directed to "sign there"; that he signed without reading the contract and without knowledge of its contents, because, as he says, he knew the company would not take his horses if he did not sign. Irrespective of this document there was evidence, as above indicated, showing that appellant was bound to transport these horses and have the car put in the Horse Special on the Michigan Central lines. Whether appellee knowingly assented to the provisions contained in the written instrument which he signed, whereby the common law liability of appellant was limited, was upon this record a question of fact to be finally determined by the Appellate Court. *Chicago and Northwestern Railway Co. vs. Calumet Stock Farm*, 194 id. 9; *Cleveland, Cincinnati, Chicago and St. Louis Railway Co. vs. Patton*, 203 id. 376; *Wabash Railroad Co. vs. Thomas*, 222 id. 337.

352 It is next contended that the contract upon which recovery was had was for a special service not provided for by the published tariffs of appellant, and if made was void for the reason that it was in violation of the Inter-State Commerce act, prohibiting discrimination among shippers. The basis of this contention is found in the fact that the contract as counted upon was to ship by a certain train over the Michigan Central lines, not under conditions of the "uniform bill of lading," while the rate was the ordinary rate for the shipment of horses from Springfield to New York under conditions of that bill of lading and by such trains as the carriers might select. The theory is, that the agreement to ship by the Horse Special was a discrimination in favor of Kirby. The Inter-State Commerce act (3 Comp. Stat. U. S. p. 3155), requires a carrier to charge the same sum against each shipper where "a like and contemporaneous service" is rendered to each, and makes a discrimination as to rates unlawful. It also provides for the making and publishing of schedules of rates, which shall contain a classification of freight and any rules and regulations which in anywise change, affect or determine any part or the aggregate of the rates. By the amendatory act of February 19, 1903, (U. S. Comp. Stat. Supp. of 1903, p. 363), it is provided: "It shall be unlawful for any person, persons or corporation to offer, grant or give, or to solicit, accept or receive any rebate, concession, or discrimination in respect of the transportation of any property in inter-state or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereto, whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs, published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereto, or whereby any other advantage is given or discrimination is practiced." It is the provision just quoted which it is contended

inhibited the making of a contract by which the horses were to go on any particular train.

The further contention as to the illegality of the contract is this: The rate paid was that fixed by the schedules for property shipped subject to what is termed "uniform bill of lading conditions," and the schedules provided that if property be shipped not subject
353 to those conditions the rate shall be higher, and fixes the amount of the increase. If the property was shipped pursuant to the contract counted upon, and appellee was not bound by the provisions of the written instrument signed by him purporting to limit the common law liability of appellant, then it was not shipped subject to "uniform bill of lading conditions." It appears that the appellant has complied with the provisions of the act just referred to, with reference to filing and publishing joint tariff rates. These rates could be ascertained at the Springfield freight office of appellant by consulting, first, a printed volume containing one hundred and thirty-two pages, known as the "Official classification;" second, a printed pamphlet of eleven pages, known as "Joint through freight tariff," and third, another document known as "List of stations taking percentage rate bases." While the Horse Special was operated for the express purpose of carrying animals designed for the eastern markets and ran but three times a week, there is nothing in these schedules from which it can be ascertained under what condition the shipper may have his stock carried by that train or from which it may be ascertained that the rate for such service as is rendered by that train would be other than the rate paid by appellee. It follows, if appellants' contention be correct, that while it has a traffic arrangement with the Michigan Central road to New York, no method has been provided whereby the shipper may be certain that he will have his horses carried by that train on the Michigan Central lines, which is specially designed to render the precise service the shipper desires.

Passing that question, however, appellant's position is that, the contract being void, appellee is without right to recover anything on account of its violation, and it is urged in this connection that appellee is conclusively presumed to have notice of the provisions of the Inter-State Commerce act, and to know, not only that he contracted for a lower rate than that which he was entitled to, but also that he contracted for a special service in shipment by a designated train to which he was not entitled and for which appellant could not contract without violation of the act last referred to. Whatever
the presumption may be, it is certain from the evidence that
354 appellee did not actually know either that he was obtaining a rate that was unlawful because it was too low, or that he was contracting for a special privilege which he could not lawfully obtain. It is also certain that the schedules showing the rates are so complicated and the rates fixed are so hedged about with conditions and subject to such exceptions that no man not entirely familiar with such schedules could within any reasonable length of time ascertain from them so simple a thing as the rate per car-load lot for the shipment of horses from Springfield, Illinois, to New

York City. The freight agent of appellant, although he had these schedules at hand, was unable to give the desired information until the third application was made to him. Schedules so prepared are of little real value to the ordinary shipper. Practically, they leave him at the mercy of the agent of the carrier. It has been frequently held in other jurisdictions that the contract for an inter-State shipment is void as to the rate, under the provisions of the Inter-State Commerce act, if the rate fixed is less than the rate charged other shippers, for a like and contemporaneous service, and that even where the carrier has contracted for the lower rate, it may collect the rate fixed by the schedules filed and published pursuant to the provisions of the law. In *Illinois Central Railroad Co. vs. Seitz*, 214 Ill. 350, however, we expressed a view somewhat inconsistent with that, holding in reference to the right of a shipper to whom a rate had been made for an inter-State shipment which it was contended was lower than should have been made to him under the provisions of our own statute designed to prevent extortion and unjust discrimination by carriers. Whether a shipper who makes a contract for an inter-State shipment at a rate that is discriminatory or which provides for a privilege not ordinarily given may recover for a failure of the carrier to comply with its contract to safely carry, where he was without knowledge of the unlawful feature of the contract, is a question not determined by the holdings in other jurisdictions just noticed. It seems clear to us that where the shipper enters into an unlawful contract in good faith, without actual knowledge of its unlawful character, even if the contract be void as to the rate fixed and even if the company may be permitted to collect the proper rate, still the rights of the shipper under the contract are not in other respects different from what they would have been if the contract had been free from the illegality mentioned. This view finds support in the case of *Merchants' Cotton Press and Storage Co. v. Insurance Co. of North America*, 151 U. S. 368. There it was charged that special rates, rebates or drawbacks had been allowed and that the contract was for that reason void in every respect. The court held that the Inter-State Commerce act made the agreement as to the special rates, rebates or drawbacks void but did not otherwise invalidate the contract of affreightment.

We do not regard the cases relied upon by appellant as in point. The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

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EXHIBIT 2.

In the Supreme Court of the State of Illinois, of the February Term,
A. D. 1909.

No. 6540.

N. T. KIRBY, Appellee,

vs.

CHICAGO & ALTON RAILROAD COMPANY, Appellant.

Appeal from Appellate Court, Third District.

Opinion Herein Filed June 16, 1909, Affirming Judgment.

Petition for Rehearing Filed by Appellant.

To the Honorable the Supreme Court:

Your petitioner, the Chicago and Alton Railroad Company, the appellant in the above entitled cause, respectfully prays this Honorable Court to grant a re-hearing in this cause, and in support of the same submits the following:

356a The opinion, written by the late Mr. Justice Scott, while clear and accurate with reference to the objections suggested in regard to the question of the authority of the live stock agent to enter into the special contract, and with reference to the limitation of liability by the bill of lading, is not—we submit with deference to the learning and ability of the late justice—distinguished by the usual exactness of statement, clarity and nice logic of that jurist, in its treatment of the questions raised under the Interstate Commerce Act.

The opinion, in relying upon the case of Illinois Central Railroad Co. vs. Seitz, 214 Ill., 350, is inaccurate both in fact and in law.

It is erroneous in fact, because it is apparent that the learned justice misapprehended the character of the shipment involved in that case.

He says:

“In Illinois Central Railroad Co. vs. Seitz, 214 Ill., 350, however, we expressed a view somewhat inconsistent with that holding, in reference to the right of a shipper to whom a rate had been made for an interstate shipment, which, it was contended, was lower than should have been made to him under the provisions of our own statute, designed to prevent extortion and unjust discrimination by carriers.”

A reference to the Seitz case will show that the shipment was not an interstate shipment, but an intrastate shipment, being from Chicago to Pana, both points being within the State of Illinois.

356b The statute of this State, only, was under consideration, and that statute (Sections 125 and 126, Chap. 114, Hurd Rev. Stat., 1903; same statute, Hurd Rev. Stat., 1908, pp. 1684-

1685), is so dissimilar in its provisions from the Interstate Commerce Act sections relied upon in this case, that no construction of the Illinois statute should be relied upon as stare decisis of the Federal statute.

The Court will also remark what is ignored in the opinion, namely, that the Interstate Commerce Act has been construed by the United States Supreme Court, upon a state of facts on all fours with the Seitz case, in a manner diametrically opposite to the construction placed on the Illinois statute in the Seitz case. (*T. P. Ry. Co. vs. Mugg*, 202 U. S., 242.)

This being true, this Court should follow the construction placed on the Federal statute by the Federal Supreme Court.

"In construing an act of Congress, its force and effect, the Supreme Court of the United States is the highest and most authoritative tribunal known to our laws, and to which other courts habitually defer. Decisions of that Court, on the meaning of an act of Congress must override those of the Supreme Court of a State on the same subject."

McGoon vs. Shirk, 54 Ill., 408; *loc. cit.*, 412;

U. S. Exp. Co. vs. People, 195 Ill., 155.

This construction of the Interstate Commerce Act in the Mugg case has been followed in every State Court in which the question has been raised, as will be seen by the citations in our original Brief, Sec. XIV, pp. 25 and 26.

Since the filing of that Brief the Supreme Court of Kentucky has handed down an interesting opinion in line with the Mugg case, in *C. & O. R. Co. vs. Maysville R. Co.*, 116 S. W., 1183, to which the attention of this Court is respectfully directed.

While we earnestly desire to remain strictly within the rule of this Court forbidding argument, we beg to especially call the attention of this Court to this case, because it seems to us on all fours with the case at bar, and as a successful refutation of the position taken by Mr. Justice Scott in the opinion filed.

That case was a suit by a shipper against a carrier for breach of contract to transport property at a preferential rate. It appeared that the shipper was wholly ignorant of the fact that the rate was preferential, and acted in complete good faith in making the contract (*loc. cit.*, 116 S. W., pp. 1184, column 2, and 1185.)

The Court says (*loc. cit.*, 1185, column 2, and 1186):

"This is not a case where it is sought to punish the shipper for obtaining a preferential rate contrary to the statutes. In such a case, in order to show guilt, it may be necessary to show knowledge. It is simply a case where the shipper seeks to obtain damages for violation of a contract that is illegal and unenforceable. No right of action

can be predicated on a contract that is contrary to public policy and void. *Newstadt vs. Hall*, 58 Ill., 172; *Jerome vs. Bigelow*, 66 Ill., 452, 16 Am. Rep., 597; *Craft vs. McCa-*

noughby, 79 Ill., 316, 22 Am. Rep., 171. * * * While it may be true that this interpretation of the statute may work a hardship in this particular instance, it is also true that it is the only interpretation that will make the Constitution and the statutes effective. To hold otherwise would be to open the door to fraud and evasion. If

the shipper, in ignorance of the rate charged other shippers for a like service, could obtain a preferential rate, and then sue and recover the difference between that rate and the regular rate charged other shippers for a like service, there would be nothing to prevent the railroad from establishing a system of rebates by which the law could be utterly defeated. Manifestly, the transportation company would be authorized to refund to the shipper that which the latter could sue for and recover."

It is interesting to note that the Supreme Court of Kentucky relies almost wholly on the Illinois Supreme Court cases, upon the question of the invalidity of a contract made in violation of a statute or public policy, while the opinion filed in the case at bar wholly overlooks that principle so firmly established in the law of Illinois, that the Illinois cases are resorted to by other courts as authority.

The opinion filed herein, in all its parts, grants that the contract declared upon was illegal as being discriminatory. (Folios 5 to 8, inclusive, of the opinion as printed.)

The learned writer of the opinion says, on folio 8:

"It seems clear to us that where the shipper enters into an unlawful contract in good faith, even if the contract be void as to the rate fixed, and even if the company may be permitted to collect the proper rate, still, the rights of the shipper under the contract are not in other respects different from what they would have been if the contract had been free from the illegality mentioned."

This statement is based upon a clear misconception, we submit.

There is not nor can there be any warrant for the assumption that "the company may be permitted to collect the proper rate."

There was no tariff rate for the special service alleged to have been contracted for; and there being no tariff rate, the service could not be furnished upon any terms. It was positively unlawful to make the contract for the prohibited special service. (Amendatory Act of February 19, 1903, quoted on Folio 6 of the opinion.)

That it has been uniformly held that a special service not provided for in the published tariffs cannot be furnished on any terms, is abundantly shown by the citations in our original Brief, Sec. XV, pp. 26, 27. Since the printing of that brief, the following additional holdings to the same effect have been made:

K. C. Hay Co. vs. St. L. & S. F. R. Co., 14 I. C. C. Rep., 631;

Follmer & Co. vs. G. N. R. Co., 15 I. C. C. Rep., 33;

Nat. L. Co. vs. S. P. L. A. & S. L. R. Co., 15, I. C. C. Rep., 434;

Carstens P. Co. vs. B. A. & P. Ry. Co., 15 I. C. C. Rep., 432.

356f In the case of Follmer & Co., above cited, the Commission says:

"Section 6 of the act provides that carriers shall file their tariffs with the Commission, showing their rates, fares and charges, and all privileges or facilities granted or allowed, and also all rules or regulations which in any wise change or affect their rates or the value of the service rendered to the passenger or shipper. The same section further provides that carriers shall not engage or participate in the

transportation of passengers or property unless they file such tariffs, and they are likewise forbidden to extend to any shipper or person any privileges or facilities except such as are specified in their tariffs. It is clear that the holding, storing, unloading and reloading of Pacific coast shipments of shingles at Menasha, subject to re-billing and re-conignment under the proportional rate from Minnesota Transfer to Chicago, was a privilege and service that required publication in a tariff in order to be lawful.

"The agent of the Great Northern at Bellingsham was clearly negligent in failing to observe and note on the billing the specified routing instructions contained in the bill of lading. But his failure to do so did not and could not result in any greater charge from point of origin to Menasha. The delivery of the shipment, however, to the Chicago, Milwaukee & St. Paul did result in the exaction of a greater charge from Menasha to Chicago than would probably have been made if the shipment had moved via the Wisconsin Central from Minnesota Transfer to Menasha, but the application of the proportional rate from Minnesota Transfer to Chicago by the Wisconsin Central on this stop-over shipment at Menasha, would have been in violation of law.

356g "Complainant's claim, therefore, rests upon this proposition: The negligence of the Great Northern Railway Company caused it to pay \$28.50 more than it would presumably have paid, but not more than it was lawfully bound to pay under the tariff then in force. An act of negligence on the part of the carrier which deprives a shipper of the enjoyment of an unlawful privilege cannot be made the basis of a claim for reparation."

It seems to us clear that the special service alleged to have been contracted for in the case at bar, in the language of the Commission, "was a privilege and service that required publication in a tariff in order to be lawful," and that the failure to perform the service, whether negligently or otherwise, "cannot be made the basis of a claim for reparation."

In another aspect the portion of the opinion quoted on pages 5 and 6 supra of this petition is indefensible.

The writer of the opinion lays stress upon the good faith of appellee in entering into the contract, such good faith being presumed from a lack of knowledge of the unlawful character of the contract.

In this connection we desire to reiterate that knowledge is presumed, both of the actual words of the Interstate Commerce Act and of the rules of the Commission made in pursuance of the act, because every one is presumed to know the law, when ignorance of it would relieve him from the consequences of a wrongful act or from liability on a contract.

356h And rules of a governmental body, made in pursuance of the statute of its creation, are as much the law as if made by the law making power and included in the statute. (Original Brief, Sec. XIV, p. 26.)

Since the printing of the original Brief herein, Volume 136 of the Appellate Court Reports of this State was published, and in that volume, at page 2, is found the case of C. P. & St. L. Ry. Co. vs.

People, a case arising under Chap. 114 of the Illinois statutes. In that case a rule made by the Railroad and Warehouse Commission was involved, which was made by the Commission in pursuance of the scheme of the statute in regard to the regulation of carriers, just as the rules involved in this case were made.

The Court says:

"So far as we are now advised, we agree with counsel that rule 23 was in effect a material part of the statute. In the legislative scheme for preventing extortion and unjust discrimination a place was left to be filled by such rule, authority to adopt it was delegated to the commissioners, its scope was bounded and its purpose declared. This appears to be the view taken by our Supreme Court in the following cases: *Moore vs. I. C. R. R. Co.*, 68 Ill., 385; *C. B. & Q. R. R. Co. vs. People*, 77 Ill., 443, and *C. B. & Q. R. R. Co. vs. Jones*, 149 Ill., 361."

Thus, we submit with deference, that the statement in the opinion involves a misapprehension of the legal consequences arising from presumed knowledge of the law.

356j But a more serious misapprehension is displayed by the statement of the learned justice in the quoted extract (which is really the pivotal conception of the whole opinion) of what is assumed to be the law in regard to the enforceability of unlawful contracts.

We submit, with deference, that if the Court means what the writer of the opinion declares, when he says:

"It seems clear to us that where the shipper enters into an unlawful contract in good faith * * * still the rights of the shipper under the contract are not in other respects different from what they would have been if the contract had been free from the illegality mentioned,"

the whole law in regard to the enforceability of illegal contracts is revolutionized, and the validity of the contract made to depend on the intent of one of the contracting parties and not on the effect of the enforcement of illegal contracts on the body politic, which has always heretofore been the ruling consideration.

The attitude of this Court as to the enforcement of illegal contracts is fairly stated in *Crichfield vs. Ber. Pav. Co.*, 174 Ill., 466, loc. cit. 482, as follows:

"It matters not that nothing improper was done, or was designed to be done by the plaintiff." * * * (loc. cit. 484) "Courts owe it to public justice and to their own integrity to refuse to become parties to contracts essentially violating morality or public policy, by entertaining actions upon them. It is judicial duty always to turn a suitor upon such a contract out of court, whenever 356j and however the character of the contract is made to appear."

Lewis vs. Hadley, 36 Ill., 433.

See also 9 Cyc. 569, note 42.

The effect of the illegality of a contract made in violation of a law is fully discussed in *Dauthart vs. Kingdon*, 197 Ill., 349, and we submit that the opinion in the present case cannot stand unless it is

the intention of the Court to disapprove and in effect reverse all its previous holdings on the subject; and we are constrained to believe that the expressions of the learned justice and his conclusions are the result of inadvertence, and not intention.

We beg also to suggest that the reliance upon the case of *Merchant's Cotton Press and Storage Co. vs. Ins. Co.*, 151 U. S., 368, is based upon a misapprehension of the facts and of the pleadings in the case at bar.

It must be borne in mind that here the appellee declares upon a contract, which the proof shows was unlawful for him to make, and that no recovery can be had save by reliance upon that contract.

The test as to whether a demand connected with an illegal act can be enforced is whether plaintiff requires any aid from the illegal demand to establish his case.

15 Am. & Eng. Ency. (2d Ed.), 993 (3);

9 Cyc. 556;

C. & O. Ry. Co. vs. Maysville B. Co., 116 S. W., 1183, at column 2 of 1184.

In the *Merchants' Cotton Press* case, there was no contract for a special service, not set out in the tariffs as here, the contract of affreightment was perfectly valid, and the complainant required no aid from the illegal portion of the transaction to establish his case. The contract for a rebate was severable from the remainder of the transaction, and in that case the language of the opinion in the case at bar would apply, for there the transportation company had only to disclaim the illegal portion of the transaction and collect its proper rate; or, on the other hand, the consignee could pay the proper rate and relieve the contract of the taint of illegality. To recover damages for the loss of the property in transit, the consignee required no aid from the illegal feature of the contract. It is also noticeable that in that case the rebate was given to certain brokers, not the real parties in interest in the contract of shipment, and the Court says:

"Jones Brothers and Company were either the agents of the owners or consignees or the sellers thereof to eastern consignees, and the rebates or drawbacks, which they claim to have been allowed, if allowed at all, according to the testimony of one of the members of the firm, was a private benefit which the firm secured, and, so far as appears, without the knowledge or consent of the owners or consignees of the cotton. Under such circumstances, if such rebates were paid or allowed to the firm by the agent of the railroad company, it is difficult to understand upon what principle such an allowance would vitiate or render void the bills of lading which the railroad company issued to the owners of the cotton."

A further consideration, which seems conclusive that a misapprehension of the *Cotton Press* Case has influenced the Court in its judgment in the case at bar, is that the Interstate Commerce Act with its amendments in force at the time appellee claims to have made his contract for the special service was a very different statute from that in force in November, 1887, the date of

the accrual of the cause of action in the Cotton Press Case. (See 151 U. S. at 371.)

The original Interstate Commerce Act is the Act of Feb. 4, 1887, and its provisions look to regulation of the carrier only, there being no provision in the four corners of the statute making any act of the shipper unlawful or punishable.

The sections of the original act declaring any conduct of any person unlawful are those numbered 2, 3, 4, 5, 6 and 7, and the penalty clause is contained in section 10.

Each of these sections declares some conduct of the carrier unlawful, or prohibits the carrier from doing some act described, and the penalty clause inflicts penalties upon the carrier.

No section of the Act of Feb. 4, 1887, which was the Act the Federal Supreme Court had under consideration in the Cotton Press Case, declares any contract of the shipper unlawful, or prohibits the shipper from doing anything, or imposes any penalty on the shipper.

Specified conduct of the carrier only is declared unlawful, and therefore the holding of the Federal Supreme Court that the contract for the rebate was void, but the contract of affreightment was not otherwise void, is strictly in accordance with well established principles.

356m "Each statute must be judged by itself as a whole, regard being had, not only to its language, but to the objects and purposes for which it was enacted. If the statute does not declare a contract made in violation of it to be void, and if it is not necessary to hold the contract void in order to accomplish the purpose of the statute, the inference is that it was intended to be directory, and not prohibitory of the contract. The statute we are considering does not, in terms, prohibit the corporation from lending money to its officers, or declare that such contracts shall be void. It is directed to the officers, and by its terms seems intended to furnish rules to regulate the duty of the officers to the corporation and its members. It does not say that the corporation shall not lend, but that the officers shall not borrow. In the words of Lord Mansfield, the statute itself "has marked the criminal." It is designed to forbid officers who are charged with the duty of investing the funds of the corporation borrowing of themselves, and thus to prevent the risk of the funds being invested by them, under the promptings of self-interest, upon insufficient security. In other words, the purpose is to protect the corporation and the policy-holders from the dishonesty of self-interest of the officers. It is intended as a shield to the corporation. To construe it as making the promises of the officers who borrow money in violation of its provisions void, would defeat the main purpose of its enactment, and would visit the consequences of the unlawful act of the officers, not upon themselves, but upon the persons for whose protection the statute was made. It would require a plain expression of legislative intention to lead us to such a construction.

Bowditch, vs. N. E. Mut. Ins. Co., 141 Mass., 292; 4 N. E. 798; loc cit. 801.

356*n* A well written text with the citation of numerous authorities illustrating the principle is found in 9 Cyc. 552-554.

So it will be seen that inasmuch as the Act of Feb. 4, 1887, prohibits and makes unlawful certain conduct of the carrier for the benefit of shippers at large, it would have been highly improper in the Cotton Press Case to hold that the prohibited act of the railroad would invalidate the contract of carriage.

This situation was apparently recognized by the Congress, for by the Act of March 2, 1889, amendatory of the Act of Feb. 4, 1887, section 10 of the original Act was amended by the addition of prohibitions against the shipper and penalties for violation of the Act by the shipper. (The section, as amended, with a note pointing out the amendment is found in 3 Comp. Stat. U. S., pp. 3160-3161.)

Later, the Congress further realizing that to make the regulation of commerce effective, the carrier and shipper must both be subjected to prohibitions and penalties, passed the amendatory Act of Feb. 19, 1903, (U. S. Comp. Stat. Supp. of 1903, p. 363), making it unlawful for any person "to solicit, accept or receive any rebate, concession or discrimination * * * whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier * * * or whereby any other advantage is given or discrimination is practiced," etc.

And this amendatory Act provides that any person who shall "solicit, accept or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor and, 356*o* on conviction thereof, shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars."

This was the situation at the time appellee entered into a contract which is indisputably discriminatory, and not authorized by any published tariff.

Under the law then in force he was in *pari delicto*, and under no authority which can be found is there any justification for the enforcement by a court of a plainly illegal contract where by statute the parties are in *pari delicto* when they enter into it.

We fear that we may have somewhat transgressed the rule forbidding argument, but it is manifestly impossible, in view of the opinion filed herein, to state "concisely the points supposed to have been overlooked or misapprehended by the Court" (Rule 30), without analyzing the opinion and the authorities relied upon therein.

We have been as brief as the importance of the questions submitted, and the gravity of the points which we believe to have been overlooked and misapprehended by the Court, would justify and we crave the indulgence of the Court for any seeming violation of the rule.

We submit, with deference, that we have shown that the judgment of the Court, as evidenced by the opinion of Mr. Justice Scott,

356*p* is founded on misapprehension of authorities relied upon, and an erroneous application of the law of illegal contracts, which, if permitted to stand as the well considered opinion

of the Court, will subvert all former rulings of the Court upon that subject.

We submit, therefore, that a proper case for a rehearing has been shown, and confidently trust that the prayer of the petitioner herein will be granted.

And your petitioner will ever pray, etc.

PATTON & PATTON,
Attorneys for Appellant.

SILAS H. STRAWN,
Of Counsel.

357

EXHIBIT 3.

Per Curiam: This is an appeal by the Chicago and Alton Railroad Company from a judgment of the Appellate Court for the Third District affirming a judgment for the sum of \$4200 recovered by Nathaniel T. Kirby, the appellee, against the appellant, in the circuit court of Sangamon County, in an action of assumpsit to recover damages for the breach of an alleged special contract entered into by appellant with appellee, whereby appellant was obligated to transport a carload of horses from Springfield, Illinois, to Joliet, Illinois, and to secure transportation for the car from that point to New York City over the lines of the Michigan Central Railroad Company.

The declaration, in one count, alleged, in substance, that on January 24, 1906, appellant, in consideration that appellee would ship a certain car-load of high-bred trotting horses over its road which he was intending to ship to New York City during that month to be sold at a sale of high-bred trotting and pacing horses at Madison Square Garden, promised appellee that said stock should be carried by it over its lines to Joliet, Illinois, and then over the lines of the Michigan Central Railroad Company by a fast stock train, known as the "Horse Special," to New York City, for the sum of \$170.60; that appellee, relying on said promises, on January 24, 1906, paid the said sum and delivered to appellant, for transportation, the said car-load of horses, and that it was received by appellant under the terms and agreements aforesaid, and that it thereby became the duty of appellant to carry said car-load of horses in accordance with the terms of said agreement, but that, wholly disregarding its duty in that behalf, appellant did not deliver said car-load of horses to the Michigan Central Railroad Company so that they could be carried on the Horse Special to New York City, but neglected and failed so to do, and by reason of such neglect and failure appellee was obliged to have them carried by a later train and by inferior and slower means of transportation, whereby said stock was delayed in transit more than forty-eight hours and reached the destination too late to be put in proper shape for exhibition and sale at said horse sale, and that by reason of such delay and inferior transportation all of said horses were
358 damaged and depreciated in value and several of them became sick, etc.

Appellant interposed the general issue. A trial by jury was had, resulting in a verdict in favor of appellee for the amount of the judgment hereinbefore mentioned. At the close of all the evidence the motion of appellant for a peremptory instruction was denied.

The appellee was engaged in the business of developing horses for racing and carriage purposes in the city of Springfield, Illinois. Early in January of 1906 he decided to ship fourteen head of high-bred horses, ranging in value from \$200 to \$3500, to New York City, to be sold at a horse sale at Madison Square Garden, in that city, the latter part of that month. Upon learning of appellee's plans he was solicited by Mr. Connor, the ticket agent for the appellant at Springfield, to ship over appellant's road. Connor suggested to appellee that he would have W. P. Eggleston, the freight agent of appellant in that city, confer with him about rates, etc. Appellee objected to dealing with Eggleston, and Connor then proposed to send R. W. Stuttzman, appellant's live stock agent, to see him. Shortly thereafter Stuttzman called on appellee for the purpose of securing the business, and at that time appellee told Stuttzman that he had a lot of high-priced horses that he wanted to ship to New York by the fastest available trains; that he desired the shipment to go by way of Joliet in order to make connections at Lake with the Horse Special on the Michigan Central Railroad, which left Chicago for New York on three days in each week. Stuttzman was unable to quote the rate on the car from Springfield to New York, and he, together with appellee, went to the office of Eggleston, who also at that time was unable to give the rate. In a day or two, however, Eggleston, upon the third application to him, telephoned appellee that the rate would be \$170.60, and appellee, with the understanding that connections would be made at Lake with the Horse Special, then directed Eggleston to order the car for January 24. A few days later Stuttzman informed appellee that he was shipping just at the right time, as the Horse Special left

Chicago on Tuesday, Thursday and Saturday of each week, 359 and that he would reach Joliet in time over appellant's line to make proper connection; that appellant would attend to having a transfer of the car made and guarantee to put him on the Horse Special.

On January 24, 1906, appellee was furnished with an Arms Palace Horse Car, in which his horses were loaded during the afternoon. When he went to the freight office to get his shipping contract, shortly before the train containing his car left for Joliet, neither Eggleston nor Stuttzman was there. A bill clerk of appellant, named Byers, was then in the office. Byers told appellee that the contract was already prepared and ready for his signature, and passed a document partly through the wire grating for appellee to sign, and he, without reading, signed. In response to appellee's inquiry if all arrangements had been made at Joliet, Byers replied that the matter had been attended to, and exhibited the way-bill indicating that the horses were to be carried on the Horse Special. The document signed by appellee contained provisions limiting the common law liability of appellant. The amount charged appellee

by appellant was the regular tariff rate of sixty-five cents per hundred on a minimum of 20,000 pounds for horses shipped under the conditions of the so-called "uniform bill of lading" and the rental of the Arms car.

Appellee accompanied the shipment and the car reached Joliet on the morning after it left Springfield. Upon its arrival there it was switched to the tracks of the Michigan Central Railroad, where it remained until about six o'clock that evening, when it was taken from there to Lake by the employees of the latter company too late for the Horse Special, but about midnight it was attached to a meat and provision train on that road and carried to New York. This train ran on a much slower schedule than the Horse Special, and arrived in New York City of January 29, thirty-six hours or more later than the Horse Special to which appellee expected his car to be attached at Lake. The car reached Joliet and was switched into the Michigan Central yards in time to have been taken by the latter company to Lake, where it could have been attached to the

360 Horse Special if proper arrangements had been made by appellant with the Michigan Central Company to have the car attached to that train, but no such arrangements had been made, and appellee, after he reached Joliet, was unable to effect the connection.

Appellee had arranged to have the horses sold at a great public auction at Madison Square Garden on the 30th, and when the car reached New York City the day before, a number of the horses were ill, and on account of the delay in transit he was unable to properly prepare and exhibit his horses before they were offered for sale, and when sold some of them were still sick, and they were otherwise in such condition, consequent upon the delay, that their value was materially lessened.

It is contended by appellant that the court erred in denying its motion to direct a verdict.

It is first contended by appellant that the motion for a directed verdict should have been allowed for the reason that "there was no evidence fairly tending to prove a contract for the Joliet connection with the Horse Special made by an agent having authority to make such contract." The evidence most favorable to appellee shows that he made a contract with Stuttzman, the live stock agent of appellant, by which the car containing his horses was to be taken to Joliet and transferred to the Michigan Central and to be by that road taken from Lake to New York City on the Horse Special, provided the rate was satisfactory. Stuttzman and Kirby then called on Eggleston, the freight agent of appellant, to ascertain what the rate would be. Eggleston stated that he was not able to quote the rate at that time but would get it. Upon the third application made by Kirby, Eggleston quote the ordinary rate to New York City and Kirby accepted. Kirby went to sign the contract on the day on which he shipped his horses. At the time he signed the instrument which Byers, the bill clerk, presented to him for signature, he asked whether the necessary arrangements had been made at Joliet. The clerk answered in the affirmative and exhibited the way-bill showing

that the car was to be taken by appellant to Joliet and showing the consignees to be "Pasig, Tipton & Co.," New York City, N. Y. On the face of the bill appeared these words: "In care of fast horse train out of Chicago on M. C. Ry. about 3 P. M. Thursday, January 25, 1906." Kirby then signed the document. We think, under the circumstances, the way-bill should be regarded as a part of the contract, and it, with the other proof just referred to, clearly shows that the contract was made as Kirby contends.

It is insisted, however, that neither Stuttsman, Eggleston nor Byers had any authority from appellant to make a contract by which the appellant was obligated to secure the shipment of these horses by the Horse Special over the Michigan Central lines. Stuttsman testified that it was his business to induce shippers to send their live stock over the lines of appellant but that he could offer no reduced rate; that what he did offer "was better service and quicker connections." It was an offer of this character which induced Kirby to make the contract, as he had already been offered precisely the same rate by other carriers. After having made the arrangement with Stuttsman for "better service and quicker connections" the freight agent fixed the rate, the billing department billed the car, and the operating department of appellant started the car on its journey in accordance with the contract originally made with Stuttsman. If it can be said that Stuttsman did not have the authority to make this contract, and if it can be said,—which we very much doubt,—that appellant did not hold him out as having such authority, we still think it entirely clear that appellant ratified Stuttsman's act in entering into the contract by billing the car and moving it to Joliet pursuant to the terms of that agreement.

The instrument signed by Kirby contained a number of provisions limiting the common law liability of the appellant in such manner that no recovery could be had in this case if appellee was bound by those provisions. The evidence shows that the instrument, already prepared, was presented to Kirby by the bill clerk and Kirby was directed to "sign there;" that he signed without reading the contract and without knowledge of its contents, because, as he says, he knew the company would not take his horses if he did not sign. Irrespective of this document there was evidence, as above indicated, showing that appellant was bound to transport these horses and have the car put in the Horse Special on the Michigan Central lines.

Whether appellee knowingly assented to the provisions contained in the written instrument which he signed, whereby the common law liability of appellant was limited, was upon this record a question of fact to be finally determined by the Appellate Court. *Chicago and Northwestern Railway Co. vs. Calumet stock Farm*, 194 Ill. 9; *Cleveland, Cincinnati, Chicago and St. Louis Railway Co. vs. Patton*, 203 id. 376; *Wabash Railroad Co. vs. Thomas*, 222 id. 337.

It is next contended that the contract upon which recovery was had was for a special service not provided for by the published tariffs of appellant, and if made was void for the reason that it was

in violation of the Inter-State Commerce act, prohibiting discrimination among shippers. The basis of this contention is found in the fact that the contract as counted upon was to ship by a certain train over the Michigan Central lines, not under conditions of the "uniform bill of lading," while the rate was the ordinary rate for the shipment of horses from Springfield to New York under conditions of that bill of lading and by such trains as the carriers might select. The theory is, that the agreement to ship by the Horse Special was a discrimination in favor of Kirby. The Inter-State Commerce act (3 Comp. Stat. U. S. p. 3155,) requires a carrier to charge the same sum against each shipper where "a like and contemporaneous service" is rendered to each, and makes a discrimination as to rates unlawful. It also provides for the making and publishing of schedules of rates, which shall contain a classification of freight and any rules and regulations which in anywise change, affect or determine any part or the aggregate of the rates. By the amendatory act of February 19, 1903, (U. S. Comp. Stat. Supp. of 1903, p. 363,) it is provided: "It shall be unlawful for any person, persons or corporation to offer, grant or give, or to solicit, accept or receive any rebate, concession, or discrimination in respect of the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the act amendatory thereto, whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereto, or whereby any other advantage is given or discrimination is practiced." It is the provision just quoted which it is contended inhibited the making of a contract by which the horses were to go on any particular train.

The further contention as to the illegality of the contract is this: The rate paid was that fixed by the schedules for property shipped subject to what is termed "uniform bill of lading conditions," and the schedules provided that if property be shipped not subject to those conditions the rate shall be higher, and fixes the amount of the increase. If the property was shipped pursuant to the contract counted upon, and appellee was not bound by the provisions of the written instrument signed by him purporting to limit the common law liability of appellant, then it was not shipped subject to "uniform bill of lading conditions." It appears that the appellant has complied with the provisions of the act just referred to, with reference to filing and publishing joint tariff rates. These rates could be ascertained at the Springfield freight office of appellant by consulting, first, a printed volume containing one hundred and thirty-two pages, known as the "Official classification"; second, a printed pamphlet of eleven pages, known as "Joliet through freight tariff"; and third, another document known as "List of stations taking percentage rate bases." While the Horse Special was operated for the express purpose of carrying animals *designed* for the eastern markets and ran but three times a week, there is nothing in these schedules from which it can be ascertained under what condition the shipper

may have his stock carried by that train or from which it may be ascertained that the rate for such service as is rendered by that train would be other than the rate paid by appellee. It follows, if appellant's contention be correct, that while it has a traffic arrangement with the Michigan Central road by which horses shipped in car load lots over its lines may be carried by the Michigan Central road to New York, no method has been provided whereby the shipper may be certain that he will have his horses carried by that train on the Michigan Central lines, which is specially designed to render the precise service the shipper desires.

364 In the case at bar we think it clear that the railroad company had a right to agree to connect with the Horse Special, and in doing so it did not agree to perform such a special service as to in any way violate the Inter-State Commerce act. The agreement to carry appellee's horses from Joliet to New York on the Horse Special was a legitimate means of procuring business, and there is nothing in the record to show that every other shipper was not entitled to the same privilege and would have been accorded it upon request. Moreover, the evidence tends to show affirmatively that other railroads were ready to accord the same special service to appellee at the quoted and contract rates agreed upon between him and appellant. The Supreme Court of the United States, in *Texas and Pacific Railway Co. vs. Inter-State Commerce Commission*, 162 U. S. 197, held that all preference and advantages are not prohibited by the Inter-State Commerce act, and quoted with approval the rule announced by Justice Jackson in the case of *Inter-State Commerce Commission vs. Baltimore and Ohio Railroad Co.* 43 Fed. Rep. 37 (which was affirmed in 145 U. S. 263), as follows: "Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate so as to give undue preference or advantage or subject to undue prejudice or disadvantage persons or traffic similarly circumstanced the act to regulate commerce leaves common carriers as they were at common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits." See also, *Southern Pacific Railway Co. vs. Inter-State Commerce Commission*, 200 U. S. 536.

We are unable to see that there is anything in the agreement to ship by Joliet so as to connect with the Horse Special violative of the provisions of the Inter-State Commerce act, as interpreted by the Federal Courts.

365 Passing that question, however, appellant's position is that, the contract being void, appellee is without right to recover anything on account of its violation, and it is urged in this connection that appellee is conclusively presumed to have notice of the provisions of the Inter-State Commerce act, and to know, not only that he contracted for a lower rate than that which he was entitled to, but also that he contracted for a special service in shipment by

a designated train to which he was not entitled and for which appellant could not contract without violation of the act last referred to. Whatever the presumption may be, it is certain from the evidence that appellee did not actually know either that he was obtaining a rate that was unlawful because it was too low, or that he was contracting for a special privilege which he could not lawfully obtain. It is also certain that the schedules showing the rates are so complicated and the rates fixed are so hedged about with conditions and subject to such exceptions that no man not entirely familiar with such schedules could within any reasonable length of time ascertain from them so simple a thing as the rate per car-load lot for the shipment of horses from Springfield, Illinois, to New York City. The freight agent of appellant, although he had these schedules at hand, was unable to give the desired information until the third application was made to him. Schedules so prepared are of little real value to the ordinary shipper. Practically, they leave him at the mercy of the agent of the carrier. It has been frequently held in other jurisdictions that the contract for an inter-State shipment is void as to the rate, under the provisions of the Inter-State Commerce act, if the rate fixed is less than the rate charged other shippers for a like and contemporaneous service, and that even where the carrier has contracted for the lower rate, it may collect the rate fixed by its schedule filed and published pursuant to the provisions of the law. In *Illinois Central Railroad Co. vs. Seitz*, 214 Ill. 350, however, we expressed a view somewhat inconsistent with that holding in reference to the right of a shipper to whom a rate had been made for an intra-

State shipment which it was contended was lower than should
366 have been made to him under the provisions of our own statute designed to prevent extortion and unjust discrimination by carriers. Whether a shipper who makes a contract for an inter-State shipment at a rate that is discriminatory or which provides for a privilege not ordinarily given may recover for a failure of the carrier to comply with its contract to safely carry, where he was without knowledge of the unlawful feature of the contract, is a question not determined by the holdings in other jurisdictions just noticed. It seems clear to us that the shipper entered into this contract in good faith and without actual knowledge of its claimed unlawful character, and even if the contract were construed to be void as to the rate fixed, and even if the company may be permitted to collect the proper rate, still the rights of the shipper under the contract are not in other respects different from what they would have been if the contract had been free from the illegality mentioned. This view finds support in the case of *Merchants' Cotton Press and Storage Co. vs. Insurance Co. of North America*, 151 U. S. 368. There it was charged that special rates, rebates or drawbacks had been allowed and that the contract was for that reason void in every respect. The court held that the Inter-State Commerce act made the agreement as to the special rates, rebates or drawbacks void but did not otherwise invalidate the contract of affreightment. And in the late case of *Standard Oil Co. vs. United States*, 164 Fed. Rep. 376, the United States Circuit Court of Appeals held that the ordinary

shipper, under any reasonable view of the Inter-State Commerce act, was not bound to cipher out, before he could safely put his property into commerce, all the confusing papers and figures that generally make up the tariff sheet. That case was, it is true, a criminal case, but we see no reason why the rule there announced should not apply in a case like this.

We do not regard the cases relied upon by appellant as in point.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

367

Order Allowing Writ of Error.

STATE OF ILLINOIS:

In the Supreme Court Thereof.

Let the writ of error issue upon the execution of a bond by the Chicago & Alton Railroad Company to Nathaniel T. Kirby in the sum of ten thousand dollars; such bond when approved to act as a supersedeas.

Dated at Springfield, in the State of Illinois, this First day of February A. D. 1910.

WILLIAM M. FARMER,

*Chief Justice of the Supreme Court
of the State of Illinois.*

367½

[Endorsed:] Nathaniel T. Kirby, Appellee (now Defendant in error), vs. Chicago & Alton R. R. Co., Appellant (now P'tf in Error). Original. Petition for Writ of Error, Assignment of Error and Prayer for Reversal. Order allowing writ attached. Filed Feb. 2, 1910. J. McCan Davis, Clerk of Supreme Court.

368

Be it Remembered that on the 2nd day of February A. D. 1910, there was duly filed in the office of the Clerk of the Supreme Court of Illinois by Chicago & Alton Railroad Company, appellant, an original bond for writ of error from the Supreme Court of Illinois in words and figures as follows to-wit:

368½

Be it also remembered that on the 2nd day of February A. D. 1910, an order was duly entered of record by the Hon. William M. Farmer, Chief Justice of the Supreme Court of the State of Illinois allowing said writ of error and approving bond for writ of error, in words and figures as follows to-wit:

In the Supreme Court of the United States and in the Supreme Court
of the State of Illinois.

No. 6540, in the Supreme Court of Illinois.

NATHANIEL T. KIRBY, Appellee, Now Defendant in Error,
vs.
CHICAGO & ALTON RAILROAD COMPANY, Appellant, Now Plaintiff
in Error.

Bond.

Know all men by these presents, that we, the Chicago and Alton Railroad Company as principal and National Surety Company as surety, are held and firmly bound unto Nathaniel T. Kirby in the sum of ten thousand Dollars to be paid to the said Nathaniel T. Kirby, to which payment well and truly to be made, we bind ourselves, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 28th day of January, A. D. 1910.

Whereas, the above named plaintiff in error, the Chicago and Alton Railroad Company, seeks to prosecute its writ of error to the United States Supreme Court to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Illinois;

Now therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute its said writ of error to effect and answer all costs and demands that may be adjudged if it shall fail to make good its plea then this obligation to be void, otherwise to remain in full force and effect.

(Signed) CHICAGO AND ALTON RAILROAD
[SEAL.] COMPANY, [SEAL.]

By W. L. ROSS, *Vice President*,
NATIONAL SURETY COMPANY, [SEAL.]
HOMER D. H. McKEE,

Resident Vice President,
M. B. MILLER,

Resident Asst. Secy., [SEAL.]

Attest:

H. E. R. WOOD,
Asst. Secretary.

Bond approved, and to operate as a supersedeas.

(Signed) WILLIAM M. FARMER,
*Chief Justice of the Supreme Court
of the State of Illinois.*

Bond agreed to be satisfactory.

(Signed)

ALBERT SALZENSTEIN.
Attorney for Defendant in Error.

370½ [Endorsed:] Copy Bond. Filed Feb. 2, 1910. J. McCan Davis, Clerk of Supreme Court.

371 Be it Remembered that on the second day of February A. D. 1910, there was duly filed in the Office of the Clerk of the Supreme Court of the State of Illinois, an original writ of error which is hereby attached and is in words and figures as follows to-wit:

372 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest Court of law or equity of the said State in which a decision could be had in the said suit between the Chicago and Alton Railroad Company, plaintiff in error, and Nathaniel T. Kirby, defendant in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened, to the great damage of the said plaintiff in error as by its complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the second day of February A. D. 1910.

[The Seal of the Circuit Court of the United States for the South'n Dist. Ill.]

JAMES T. JONES,
*Clerk of the Circuit Court of the United States
in and for the Southern District of Illinois.*

Approved and allowed by the Honorable William M. Farmer,
Chief Justice of the Supreme Court of the State of Illinois.

WILLIAM M. FARMER,
*Chief Justice of the Supreme Court
of the State of Illinois.*

Feb. 1, 1910.

373½ [Endorsed:] Chicago & Alton R. R. Co., Plaintiff in Error,
vs. Nathaniel T. Kirby, Defendant in Error. Original. Writ
of Error. Filed Feb. 2, 1910. J. McCan Davis, Clerk of Supreme
Court.

374 *Certificate of Lodgment.*

SUPREME COURT,
State of Illinois, ss:

I, J. McCan Davis, Clerk of the said Supreme Court, do hereby
certify that there was lodged with me as such Clerk on the 2nd day
of February A. D. 1910

No. 6540.

In the Matter of N. T. KIRBY, Appellee,
vs.

CHICAGO & ALTON RAILROAD COMPANY, Appellant.

1. The original bond of which a copy is herein set forth.
2. Two copies of the writ of error as herein set forth, one for
defendant and one to file in my office.

In testimony whereof I have hereunto set my hand and affixed
the seal of the said Supreme Court at Springfield this 28th day of
February, A. D. 1910.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

J. MCCAN DAVIS,
Clerk Supreme Court.

375 Original.

THE UNITED STATES OF AMERICA, ss:

The President of the United States to Nathaniel T. Kirby, Greeting:

You are hereby cited and admonished to be and appear at and
before the Supreme Court of the United States at Washington, Dis-

trict of Columbia, within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Illinois, wherein the Chicago and Alton Railroad Company is plaintiff in error, and you, Nathaniel T. Kirby, are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Chief Justice of the Supreme Court of the State of Illinois this First day of February A. D. 1910.

WILLIAM M. FARMER,
Chief Justice of the State of Illinois.

Attest:

J. McCAN DAVIS,
Clerk of the Supreme Court of the State of Illinois.

SPRINGFIELD, ILLINOIS.

I, the undersigned, attorney of record for the defendant in error in the above entitled cause, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

ALBERT SALZENSTEIN,
Attorney for Defendant in Error, Nathaniel T. Kirby.

[Endorsed:] Chicago & Alton R. R. Co., Plaintiff in Error, vs. Nathaniel T. Kirby, Defendant in Error. Original. Citation with acknowledgment of service. Filed Feb. 2, 1910. J. McCan Davis, Clerk of Supreme Court.

376 *Return to Writ.*

UNITED STATES OF AMERICA,
Supreme Court of Illinois, ss:

In obedience to the commands of the within writ I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of said Supreme Court of Illinois in the City of Springfield this 28th day of February A. D. 1910.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

J. McCAN DAVIS,
Clerk Supreme Court of Illinois.

Costs of Suit.

Clerk's Costs \$44.05, paid by Chicago and Alton Railroad Co.
Costs of Transcript \$168.20, paid by Chicago and Alton Railroad Co.

J. McCAN DAVIS,
Clerk Supreme Court of Illinois.

377 In the Supreme Court of the United States.

CHICAGO & ALTON RAILROAD COMPANY, Plaintiff in Error,
vs.
NATHANIEL T. KIRBY, Defendant in Error.

Stipulation as to Printing Record.

It is stipulated and agreed by and between James W. Patton, of counsel for Plaintiff in Error, and Albert Salzenstein, counsel for Defendant in Error, that in order to save expense in the printing of the record herein, *that* the following portions of the record, the same being sufficient to show the errors complained of, shall be printed, and no more, to-wit:

All of the record and bill of exceptions, and all of the various Exhibits except as below specified;

First. The following shall be printed in lieu of the whole of Exhibit D. found at page 194 of the record herein.

"Exhibit D. consists of a printed pamphlet, measuring 8 inches by 11 inches, with cover page, title page, Index on pages i to xxv, and pages 1 to 132. The cover page is as follows:"

(Print cover page in full.)

"The title page is a copy of the cover page."

"Pages I and II of said Exhibit D. are as follows:"

(Here print pp. I and II in full.)

"Page xx of said Exhibit D. is as follows:"

(Here print p. xx of said Exhibit in full.)

"Page 1 of said Exhibit D. is as follows:"

(Here print page 1 in full.)

"Each succeeding page of said Exhibit D. to and including page 132, has at the top of the page the following words found printed at top of page 1 foregoing:"

"Property shipped not subject to Uniform Bill of Lading Conditions, will be charged twenty (20) per cent. higher than as herein provided (subject to a minimum increase of one (1) cent per 100 lbs.) and cost of Marine Insurance. (See Rule 1)."

378 "And at the bottom of each of said pages is found printed the following words found at the bottom of page 1 foregoing:"

"Official Classification No. 27. Read Rules and Special Instructions carefully."

"Pages 15 and 16 of said Exhibit D are as follows:"

(Here print pp. 15 and 16 in full.)

"Page 19 of said Exhibit D is as follows:"

(Here print page 19 in full.)

"Pages 81 to 85 inclusive of said Exhibit D are as follows:"

(Here print pp. 81 to 85 inclusive.)

"All other pages of said Exhibit D not specified above are to be omitted."

Second. The first two pages, that is, the title page and the next

page of Exhibit K. found at page- 261-2 of the record shall be printed, and the subsequent pages of said Exhibit K. are to be omitted.

It is further stipulated and agreed, that if from oversight or omission any necessary part of the record be not thus printed, that the plaintiff in error has the right to print, or may be required by defendant in error to print, any further or additional portions thereof.

Dated this 17th day of March A. D. 1910.

JAMES W. PATTON,
 SILAS H. STRAWN,
 WILLIAM L. PATTON,
Of Counsel for Plaintiff in Error.
 JAMES M. GRAHAM &
 ALBERT SALZENSTEIN,
Of Counsel for Defendant in Error.

379 [Endorsed:] In the Supreme Court of the United States.
 Chicago & Alton R. R. Co., Plaintiff in Error, vs. Nathaniel
 T. Kirby, Defendant in Error. Original. Stipulation as to printing
 record. James W. Patton & W. L. Patton of Counsel for Pl'ff in
 Error.

380 [Endorsed:] File No. 22,057. Supreme Court U. S.,
 October Term, 1909. Term No. 831. Chicago & Alton R. R.
 Co., Pl'ff in Error, vs. Nathaniel T. Kirby. Stipulation as to Print-
 ing Transcript of Record. Filed April 7, 1910.

Endorsed on cover: File No. 22,057. Illinois Supreme Court.
 Term No. 226. Chicago & Alton Railroad Company, plaintiff in
 error, vs. Nathaniel T. Kirby. Filed March 9th, 1910. File No.
 22,057.



15
Office Supreme Court, U. S.
FILED.

FEB 23 1912

JAMES H. MCKENNEY,
CLERK

IN THE
Supreme Court of the United States.

OCTOBER TERM, A. D. 1911.

No. 226

THE CHICAGO & ALTON RAILROAD COMPANY,
Plaintiff in Error,

vs.

NATHANIEL T. KIRBY,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

SILAS H. STRAWN,
WILLIAM PATTEN,
GARRARD B. WINSTON,
Counsel for Plaintiff in Error.



IN THE
Supreme Court of the United States.

OCTOBER TERM, A. D. 1911.

No. 226

THE CHICAGO & ALTON RAILROAD COMPANY,
Plaintiff in Error,

vs.

NATHANIEL T. KIRBY,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

This is a suit brought in assumpsit by the defendant in error against the plaintiff in error in the Circuit Court of Sangamon County, Illinois. Verdict for the defendant in error. Judgment on the verdict. Appealed to the Appellate Court of the State of Illinois for the Third District. Judgment affirmed. Appealed to the Supreme Court of the State of Illinois. Judgment affirmed. Petition for rehearing granted. Rehearing and judgment affirmed. Writ of error of this court to the Illinois Supreme Court for a reversal of the judgment.

The defendant in error, hereinafter called Kirby, was engaged in the business of developing horses for racing and carriage purposes in the City of Springfield, Illinois. In January, 1906, he decided to ship 14 head of horses to New York City to be sold at a horse sale at Madison Square Garden in that city. The plaintiff in error, hereinafter called the Alton, is a common carrier operating a line of railroad from Springfield, in the State of Illinois, through Joliet to Chicago and engaged, in connection with other railroads, in interstate transportation subject to the Interstate Commerce Act. The Alton Railroad connects with the Michigan Central Railroad at Joliet, Illinois, and at Chicago. The Michigan Central main line runs from Chicago through Lake, Indiana and Michigan City to the East. A branch line runs from Joliet, Illinois, to Lake, Indiana, where it connects with the main line. These two lines, in connection with the Alton's line between Joliet and Chicago, form a triangle permitting a junction with the Michigan Central either at Joliet or Chicago. In 1906 the Michigan Central Railroad operated three times a week a "Horse Special" which ran from the Union Stock Yards in Chicago to New York. This was the fastest available train for the shipment of live stock to the East.

A soliciting freight agent of the Alton heard that Kirby intended to ship horses to New York and solicited the business from him. (Trans., 18, 119-121.) At this time Kirby was considering shipping via the Wabash or the Illinois Central which were competitors of the Alton. (Trans., 51.) Kirby had heard of the "Horse Special" over the Michigan

Central and desired to have his horses go on that train, but was unwilling to have his car handled through the Union Stock Yards at Chicago, if it could be avoided. (Trans., 52, 53.)

The soliciting freight agent of the Alton knew of no routing except through Chicago, but Kirby told him that the car could be routed by way of Joliet and the branch line of the Michigan Central. (Trans., 121, 124, 168.) Kirby then asked for a rate for a corload of horses in a chartered car from Springfield to New York. (Trans., 169.) A rate was given Kirby by the Alton of 65 cents per hundred pounds, minimum 20,000 pounds, or \$170.60 including the hire of the car (Trans., 169, 183), and Kirby ordered the Alton to provide the car for January 24th. The car was hired from the Arms Palace Horse Car Company, an independent corporation, and the charge for the use of the car added to the freight bill of Kirby. On January 24, 1906, an Arms Palace Horse Car was furnished and the horses were loaded therein by Kirby that afternoon. Kirby then went to the freight office of the plaintiff in error and signed what is known as a Uniform Live Stock Contract (Trans., 160), providing for the shipment of horses from Springfield to Joliet. (Trans., 162.) Kirby routed the shipment by way of Joliet and the bill clerk inserted on the waybill at his direction the following (Trans., 20, 58):

“In care of fast horse train out of Chicago on M. C. Ry. about 3 P. M. Thursday, January 25, 1906.”

The car reached Joliet where it was to connect with the branch line of the Michigan Central upon

schedule time the morning of the 25th and was delivered to the receiving tracks of the Michigan Central at that point without delay. (Trans., 148-151.) Kirby signed the Uniform Live Stock Contract of the Michigan Central for transportation from Joliet to New York. (Trans., 96-99.) There was no scheduled train from Joliet over the Michigan Central which could take this car to the connection of the main line of Michigan Central until 6:30 in the evening of the 25th (Trans., 138-140), when the car was attached to a regular freight train out of Joliet and reached Michigan City, the division point of the Michigan Central, after the "Horse Special" which left on that day, had passed. The car was then attached to the first through fast freight which was a meat train and was delivered into New York without delay but thirty-six (36) hours later than it would have arrived if the car had been attached to the "Horse Special." By reason of the longer time in transit, the horses were damaged and sold at the public auction at Madison Square Garden in New York for considerably less than the horses would have sold for if they had reached New York on the "Horse Special."

Kirby claimed that he had a guarantee from the soliciting freight agent of the Alton to have his car of horses connected at Joliet with the Michigan Central and hauled from there to the main line of the Michigan Central in time to catch the "Horse Special" out of Chicago on January 25th. This was denied by the Alton's agent.

The ordinary way of making such connection was

through the Union Stock Yards at Chicago, and if the car had been hauled to Chicago it would have arrived there about 8 A. M. in ample time to catch the "Horse Special" which left at 3:30 P. M. This was known to Kirby. There was, however, no freight train on the Michigan Central out of Joliet after the car reached Joliet which could have connected with the "Horse Special" on the main line.

There was no negligence or delay in handling the car from Springfield to Joliet or from Joliet to New York City. The shipment was through from Springfield, in the State of Illinois, to New York, in the State of New York.

The tariffs and classifications of the Alton on file with the Interstate Commerce Commission and at the Alton's station at Springfield, Illinois, were as follows:

1. Joint Through Freight Tariff on Classes (Exhibit K, Trans., 170) giving a list of stations on the Chicago & Alton Railway taking the various "percentage rate basis" of the Chicago-New York rate in which Springfield was named as taking one hundred sixteen per cent. (116%) rate group per cent. basis of the Chicago-New York rate.

2. Joint Through Freight Tariff (Exhibit E, Trans., 127), naming rates on commodities, also live stock covering shipments from points in rate groups to New York and reading as follows:

SUBJECT TO OFFICIAL CLASSIFICATION.

FROM Points in Groups shown below. (See note*)	TO NEW YORK, N. Y. Applying on	Rates in Cents per 100 lbs. Minimum weight governed by Official Classifi- cation.
116 Per Cent Group. . . .	Horses and Mules, C. L.	65

*The note refers back to (1.) supra.

3. The official classification No. 27 (Exhibit D, Trans., 126) which contained the following notation in bold faced type upon each page:

'Property shipped not subject to uniform bill of lading conditions will be charged twenty (20) per cent. higher than as herein provided (subject to a minimum increase of one (1) cent per 100 lbs. and cost of marine insurance.) (See Rule 1.)'

The Rule 1 referred to provides:

1. (a) Unless otherwise provided in this classification, property will be carried at the reduced class rates specified herein, if shipped subject to the conditions of the uniform bill of lading (see page 10). If consignor elects not to accept the said reduced class rates and conditions, he should so notify the agent of the forwarding carrier at the time his property is offered for shipment, and if he does not give such notice it will be understood that he desires his property carried subject to uniform bill of lading conditions in order to secure the reduced class rate thereon. Property carried not subject to the conditions of the uniform bill of lad-

ing will be at the carrier's liability, limited only as provided by the common law and by the laws of the United States and of the several states in so far as they apply. Property thus carried will be charged twenty (20) per cent. higher (subject to a minimum increase of one (1) cent per one hundred pounds), than if shipped subject to the conditions of the uniform bill of lading, and the cost of marine insurance will be added over any part of the route that may be by water.

(b) This official classification provides for two distinct forms of bills of lading to be used, respectively, as the consignor may elect, to have a limited liability or a carrier's liability service.

For convenience in use, the forms printed in full in this classification and containing conditions limiting the carrier's liability in consideration of a reduced class rate will be designated and referred to respectively as:

Uniform Bill of Lading.

Uniform Export Bill of Lading.

Uniform Live Stock Contract.

When the consignor gives notice to the agent of the forwarding carrier that he elects not to accept the reduced class rates and conditions, but desires a carrier's liability service at the higher class rate charged for that service the carrier must print, write or stamp upon shipping receipts and bills of lading a clause reading:

'In consideration of the higher rate charged the property herein described will be carried at the carrier's liability, limited only as provided by the common law and by the laws of the United States and of the several states, in so far as they apply.'

On page 15 of the classification the Uniform Live Stock Contract is set out, which provides, among other things, the following:

"That said shipper, or the consignee, is to pay

freight thereon to the said carrier at the rate of _____ per _____, which is the lower published tariff rate, based upon the express condition that the carrier assumes liability on the said live stock to the extent only of the following AGREED VALUATION, UPON WHICH VALUATION IS BASED THE RATE CHARGED FOR THE TRANSPORTATION OF THE SAID ANIMALS, and beyond which valuation neither the said carrier nor any connecting carrier shall be liable in any event, whether the loss or damage occur through the negligence of the said carrier or connecting carriers or their employes or otherwise:

If horses or mules, not exceeding one hundred dollars each.

* * * * *

And in no event shall the carrier's liability exceed twelve hundred dollars upon any carload.

* * * * *

And (*shipper's name*) do (*does or do*) hereby acknowledge that (*he or they*) had the option of shipping the above described live stock at a higher rate of freight according to the official tariffs, classifications and rules of the said carrier and connecting carriers, and thereby receiving the security of the liability of the said carrier and connecting railroad and transportation companies as common carriers of the said live stock upon their respective roads and lines, but ha..... (*has or have*) voluntarily decided to ship same under this contract at the reduced rate of freight above first mentioned."

Page 81 of the classification provides:

"Live stock carloads (see special tariff) subject to the uniform live stock contract and the following regulations. (See notes.)

Horses or mules (including stallions or jacks), when not exceeding twenty (20) animals are loaded in one car, per car, 20,000 lbs.

Page 83 of the classification provides:

"Live stock will be taken at the reduced rates fixed in the tariff only when a uniform live stock contract is executed by the station agent and the consignor, and when the release on the back of said contract is executed by man or men who are to accompany said live stock. If consignor refuses to execute a uniform live stock contract, the live stock will be charged twenty (20) per cent. higher than the reduced rates specified herein; provided, that in no case shall such higher charge be less than one (1) cent per one hundred pounds.

* * *

The rates and classification of live stock as given in this tariff are based upon the following maximum valuations:

If horses or mules (including stallions or jacks), not exceeding \$100 each.

* * *

If a full chartered car, on the entire contents of each car, not exceeding \$1,200.

The company does not agree to transport live stock by any particular train, within any specified time, nor in time for any particular market, and agents must not give receipts containing such guarantee.

Neither will the company be responsible for any loss or damage occurring by the refusal, failure or inability of a connecting line to receive and forward the stock after tender of delivery."

The shipment of this particular car from Springfield to New York was the minimum carload rate, 20,000 pounds at sixty-five cents (65c) per one hundred pounds, plus the rental cost of the Arms Palace Horse Car, and under the tariffs of the Alton was subject to the conditions of the Uniform Live

Stock Contract with a maximum valuation of one hundred (\$100) per head or twelve hundred dollars (\$1,200) for the entire contents of the car and with the provision that the Alton does not agree to transport by any particular train, within any specified time, or in time for any particular market, and that agents must not give receipts containing such a guarantee.

Suit was brought in the state courts of Illinois in assumpsit upon a special count upon the following alleged contract (Trans., 2):

“And on the day and year first aforesaid, by its authorized agent, in consideration that the plaintiff would ship a certain carload of high bred trotting horses over its road, which it knew he was going to ship to New York City that month, to be sold at the great horse sale of high bred trotting and pacing stock to be held during said month at Madison Square Garden, in the said last named city, *then and there promised said plaintiff that it would arrange and agree that said stock would be promptly carried and delivered so as to be carried to New York on the fast stock train on the Michigan Central Railroad, with which it connected at Joliet, Illinois, known as “The Horse Special,”* and would have said carload of horses carried through to New York as aforesaid for the sum of \$170.60; and plaintiff, relying upon said promise, accepted said offer and agreed to ship the said stock aforesaid.”

The breach alleged is as follows:

“And plaintiff avers that it then and there became and was the duty of the defendant to have carried the same and to have promptly delivered the same to the said Michigan Central Railroad Company, so that said horses could

have been carried by said latter company on said fast train known as 'The Horse Special,' but that the defendant, wholly disregarding and neglecting its duty in that behalf, *did not so deliver the same to the Michigan Central Railroad Company, so that said horses could be carried on said 'Horse Special' to New York*, which, if done, said horses would have reached New York on the morning of January 27, 1906, at or about 7 o'clock."

By reason of the failure of the Alton to connect with the "Horse Special" of the Michigan Central the horses were claimed to be damaged in their salable value to the extent of \$4,900. The jury brought in a verdict in favor of Kirby and against the Alton in the amount of \$4,200.

By appropriate motions (Trans., 186, 196, 199) and by the offering of proper instructions (Trans., 190), the plaintiff in error raised in the trial court and by assignment of errors in the Appellate Court and in the Supreme Court of Illinois (Trans., 207) the federal questions that the alleged special contract for expedited service upon which alone suit was brought was in violation of the Act to Regulate Commerce, and of the Elkins Act, and that payment of damages in excess of the amounts stipulated for in the tariffs and classification of the Alton, that is, one hundred dollars (\$100) per head or twelve hundred dollars (\$1,200) for the entire carload was not permitted under the provisions of the same statutes.

There are two points involved in the case:

First: Is a special contract for expedited service void because it is a privilege or facility not specified

in the tariffs of plaintiff in error and therefore one which the plaintiff in error could not under the law make; and

Second: If any recovery may be had, is the defendant in error bound by the provisions of the tariffs and classifications of the plaintiff in error and by the Uniform Live Stock Contract under which his shipment was made to the valuations contained therein upon which the rate is based?

SPECIFICATIONS OF ERRORS RELIED UPON

The errors specifically relied upon by plaintiff in error are the following:—

I.

The Supreme Court of Illinois erred in affirming the judgments of the Appellate Court and the Circuit Court of Sangamon County.

II.

The Supreme Court of Illinois erred in not reversing the said judgments of the Appellate Court, and the said Circuit Court.

III.

The Supreme Court of Illinois erred in holding that the contract set forth in the declaration was a valid contract.

IV.

The Supreme Court of Illinois erred in refusing to hold said contract void as being a contract in violation of the Acts of Congress of February 4th, 1887, and the amendments thereto, commonly called the "Interstate Commerce Act," or the "Act to regulate Commerce."

V.

The Supreme Court of Illinois erred in affirming the said judgment enforcing a contract which was

void as being in contravention and violation of the Act of Congress of February 4th, 1887, entitled "An Act to Regulate Commerce" as amended by the Act of March 2nd, 1889, and in contravention and violation of the Act of February 19th, 1903, entitled "An Act to Further Regulate Commerce With Foreign Nations and Among the States."

VI.

The Supreme Court of Illinois erred in its construction and application of certain clauses and sections of a statute of the United States, that is to say clauses and sections of the said Act of February 4, 1887, as amended by said Act of March 2nd, 1889, and of said Act of February 19th, 1903, and erred in denying to plaintiff in error a right, title, privilege or immunity, specially set up or claimed under such clauses and sections to the great damage of the plaintiff in error.

VII.

The Supreme Court of Illinois erred in holding that the alleged contract was not invalid in that it was, if made, a violation of the said Act of Congress and amendments, and particularly a violation of Sections two, three, six and ten of the Act of February 4th, 1887, entitled "An Act to Regulate commerce" as amended by the Act of March 2nd, 1889. (3 U. S. Compiled Statutes, pages 3155, 3156, 3157, 3158, 3159, 3160, 3161), and of Section One of the Act of February 19, 1903, being entitled "An Act to Further Regulate Commerce with Foreign Na-

tions and Among the States." (32 Stat., 847, 1903 Supp. U. S. Compiled Statutes, pages 363 and 364.)

VIII.

The Supreme Court of Illinois erred in refusing to hold that said contract was invalid as being in violation of said Acts and Sections thereof.

IX.

The Supreme Court of Illinois erred in refusing to hold that said contract was discriminatory and unlawful under said Acts and sections thereof.

X.

The Supreme Court of Illinois erred in holding that the defendant in error was not bound by the terms and provisions of the "Official Classification," "Joint Through Tariff," and "List of Stations Taking Percentage Rate Bases."

XI.

The Supreme Court of Illinois erred in holding that the plaintiff in error had a right, under the evidence in the case, to agree to carry the horses and connect with the "Horse Special."

XII.

The Supreme Court of Illinois erred in holding that the alleged agreement to carry the horses and connect with a particular train *via* Joliet at the tariff rate, was not an agreement to perform a spe-

cial service not provided for by the published rate and tariff.

XIII.

The Supreme Court of Illinois erred in holding that there was nothing in the alleged contract to ship by Joliet so as to connect with the Horse Special, violative of the said Acts and sections thereof as interpreted by the Supreme Court of the United States.

XIV.

The Supreme Court of Illinois erred in holding that if the defendant in error entered into the said contract in good faith and without actual knowledge of its unlawful character, and even if the contract were construed to be void as to the rate fixed, and even if the plaintiff in error might be permitted to collect the proper rate, still the rights of the defendant in error under the contract are not in other respects different from what they would have been if the contract had been free from the illegality mentioned, that is to say the illegality of the rate made.

XV.

The Supreme Court of Illinois erred in holding that the defendant in error was not presumed to have knowledge of the provisions of the said Acts and Sections thereof, and of the provisions of the "Official Classification," "Joint Through Freight Tariff" and "List of Stations Taking Percentage Rate Bases."

XVI.

The Supreme Court of Illinois erred in holding that defendant in error was not presumed to know that he contracted for a lower rate than that to which he was lawfully entitled, and that he contracted for a special service in shipment by a designated train to which he was not lawfully entitled and for which plaintiff in error and defendant in error could not contract without violation of the said Acts and sections thereof.

XVII.

The Supreme Court of Illinois erred in its construction and application of the law with reference to said Acts and sections thereof as hitherto declared and announced by the Supreme Court of the United States.

XVIII.

The Supreme Court of Illinois erred in that the judgment aforesaid given was given for the said Nathaniel T. Kirby against the said Chicago & Alton Railroad Company, whereas, by the law of the land the said judgment ought to have been given for the said Chicago & Alton Railroad Company.

ARGUMENT.

I.

THE GUARANTEE OF SPECIAL DELIVERY UPON WHICH ALONE THIS SUIT WAS BROUGHT IS AN UNLAWFUL DISCRIMINATION AND THEREFORE VOID.

Whatever may have been the law prior to the passage of the Interstate Commerce Act as to the right of a common carrier to make special contracts with special members of the public for different privileges or facilities or rates for the transportation of the same commodity, since the new act has governed interstate transportation no such right now exists. As was said by Mr. Justice White in *New Haven Railroad Company v. Interstate Commerce Commission*, 200 U. S., 361, page 391:

“It cannot be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and destroy favoritism, these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences and all other forms of undue discrimination. To this extent and for these purposes the statute was remedial and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve. That a carrier engaged in interstate commerce becomes subject as to such commerce to the commands of the statute, and may not set its provisions at naught whatever otherwise may be its power when carrying on

commerce not interstate in character, cannot in reason be denied."

Again on page 392:

"For, of course, if a carrier has a right to disregard the published rates by resorting to a particular form of dealing it must follow that there is no obligation on the part of a carrier to adhere to the rates, because doing so is merely voluntary. The all embracing prohibition against either directly or indirectly charging less than the published rates shows that the purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be brought about. If the public purpose which the statute was intended to accomplish be borne in mind, its meaning becomes, if possible, clearer. What was that purpose? It was to compel the carrier as a public agent to give equal treatment to all."

The question first arises what was the contract of carriage at the certain rate in this case, *i. e.*, what would a member of the public desiring to ship a carload of horses from Springfield to New York have received from the Alton in exchange for the payment of the freight rate of 65 cents per 100 pounds, minimum 20,000 pounds. This brings us to a consideration of the service furnished by a common carrier in the transportation of live stock in exchange for the compensation fixed in its tariff. It is clear that the common carrier is bound to carry safely to destination with all convenient dispatch and with what can not be more accurately defined than within a reasonable time—not a fixed time but a time reasonable in view of the general circumstances of transportation. This duty to deliver within a rea-

sonable time is engrafted by the law upon the principal contract, which is to carry safely and this implied contract is breached only if the carrier be guilty of negligent delay in the handling and delivery of the shipment. Any member of the public tendering the Alton at Springfield a carload of horses for New York City paying the published rate of 65 cents per 100 pounds, minimum 20,000 pounds, is entitled simply to the carriage of that carload of horses by the Alton within a reasonable time and without negligent delay.

This case was brought by Kirby in *assumpsit* against the Alton, not upon the common law obligation of the Alton to carry within a reasonable time without negligent delay, but upon a SPECIAL CONTRACT OF GUARANTEE to connect Kirby's car of horses with the "Horse Special" of the Michigan Central Railroad Company. Except for this *guarantee* there could be no right of action against the Alton for any damage in this case since it is admitted that there was no negligent delay in the handling of this car by the Alton and delivery was made at destination within a reasonable time. Is this contract valid or is it a method of dealing which brings about the forbidden result of discrimination?

Assuming that there was at Springfield in 1906 a competitor of Kirby's engaged in raising and training horses, that he desired to ship a carload of horses to the auction at Madison Square Garden on January 24, 1906, and that he tendered this carload of horses to the Alton upon the same day as Kirby's carload of horses was tendered. Kirby and his com-

petitor would each pay 65 cents per 100 pounds, minimum 20,000, for the transportation of the earload to New York. The two cars would be attached to the same train, taken to Joliet, would not connect with the "Horse Special," would be carried to New York upon the meat train and would arrive there 36 hours later than they would have arrived if connection had been made with the "Horse Special." Kirby by some special method of dealing had obtained a guarantee by the Alton to make connection with the "Horse Special." The Alton had not made a similar guarantee to Kirby's competitor as there was certainly no obligation upon it to do. The condition of the *guarantee* having been breached, Kirby could recover from the Alton his damages while his competitor there being no breach of the contract of carriage could recover nothing although his shipment was made on the same train and handled in the same way as Kirby's and the rate was the same in each instance. Which contract is valid? The special contract of guarantee with Kirby or the contract open to the public in general with his competitor? This court in *Armour Packing Company v. U. S.*, 209 U. S., 56, pp. 80, 81, answers the question:

"There is no provision for the filing of contracts with shippers and no method of making them public defined in the statute. If the rates are subject to secret alteration by special agreement then the statute will fail of its purpose to establish a rate duly published, known to all, and from which neither shipper nor carrier may depart.

It is said that if the carrier saw fit to change the published rate by contract the effect will

be to make the rate available to all other shippers. But the law is not limited to giving equal rates by indirect and uncertain methods. It has provided for the establishing of one rate, to be filed as provided, subject to change as provided, and that rate to be while in force the only legal rate. Any other construction of the statute opens the door to the possibility of the very abuses of unequal rates which it was the design of the statute to prohibit and punish."

Is there any more obvious method of favoring one shipper over another than by permitting the carrier at its caprice to make a special contract guaranteeing a particular delivery with one shipper and to decline as under the law it has a right to do to make a similar contract with another shipper. If the contract of guarantee with Kirby be legal then it would be legal for the Alton to guarantee to one shipper transportation of his goods upon passenger train schedule while requiring the goods of a competitor to be transported upon freight train schedule. It is common knowledge that express rates are higher than freight rates for the same commodities simply for the reason that express matter is handled upon passenger trains at passenger train schedules, whereas freight is handled on freight trains at freight train schedule. Would it have been permissible for the Alton at its published FREIGHT rate to have entered into an agreement with Kirby that his car of horses be attached to a passenger train out of Chicago and carried to destination upon passenger train schedule thereby permitting Kirby to have the same benefit which would accrue to him if he had seen fit to ship his horses by express between Chicago and New York.

The test is simply this. Was the guarantee of special delivery a preference to Kirby as defined in the New Haven case (*supra*)? If the Alton could withhold or grant the guarantee, unless the guarantee must be given *by the tariff* as implied by law to all, then being of value, connected with interstate transportation, it is void and the basis of this suit fails.

II.

THE CONTRACT SET OUT IN THE DECLARATION BEING FOR A SPECIAL SERVICE NOT NOTED IN, BUT ON THE CONTRARY PROHIBITED BY THE PUBLISHED TARIFFS, EVEN IF MADE WAS VOID, AS BEING IN VIOLATION OF THE SECTIONS OF THE INTERSTATE COMMERCE ACT PROHIBITING DISCRIMINATION, AND NO RECOVERY COULD BE HAD THEREON.

The bill of particulars filed by Kirby is entitled,

"An itemized statement of the damages occasioned to said Kirby in the shipment of fourteen head of high class trotters and pacers by breach of special contract entered into January 18th, 1906, for the transportation of the same to New York on the 'Horse Special.' " (Trans., 9.)

The declaration consists of one special count declaring on a contract to transport the horses to Joliet and deliver same "so as to be carried to New York on the fast stock train on the Michigan Central Railroad," etc. (Trans., 24.)

The proof is of a character which leaves no uncertainty that it was upon a special agreement for a special service, alleged to have been made by Stuttsman, that the action was based. (Trans., 19, 52, 63.)

Any such contract, based on the regular tariff rate of 65 cents per hundred pounds, was, if made, (which we deny), wholly illegal and void, as being in violation of the provisions of the Interstate Commerce Act and the amendments thereto, in force at the time of the shipment.

The Interstate Commerce Act and its amendments seeks to provide a complete code for the government of carrier and shipper in their relations to each other with respect to tariffs and rates, all aimed at the purpose of enforcing an absolute equality between shippers and preventing the granting of any privilege to the shipper which may effect the value of the services performed.

As is said by the Supreme Court of the United States in *T. & P. R. Co. v. Abilene C. O. Co.*, 204 U. S., at 439:

“That the act to regulate commerce was intended to afford an effective means for redressing the wrongs resulting from unjust discrimination and undue preference is undoubted. Indeed, it is not open to controversy that to provide for these subjects was among the principal purposes of the Act. And it is apparent that the means by which these great purposes were to be accomplished was the placing upon all carriers the positive duty to establish schedules of reasonable rates which should have a uniform application to all, and which should not be departed from so long as the established schedule remained unaltered in the manner provided by law.”

The act provides specifically as to the correlative duties of the carrier and shipper with respect to discrimination and preference.

Sec. 2 of the Act (3 Comp. Stat. U. S., p. 3155), inhibits a carrier from collecting a greater or less compensation for any service to be rendered than it collects from any other person for a like and contemporaneous service, and declares such a discrimination unlawful.

Sec. 6 of the Act, (Ibid, p. 3156), provides for the making and publication of schedules "which shall contain the classification of freight * * * and any rules and regulations which in anywise change, affect or determine any part of the aggregate of such aforesaid rates and fares and charges."

The same section provides:

"And when any such common carrier shall have established and published its rates, fares and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, than is specified in such published schedule of rates, fares and charges as may at the time be in force."

This section provides for the publication of joint tariffs, and for the measure of publicity to be given the same, and also provides (p. 3158):

"It shall be unlawful for any common carrier, party to any joint tariff, to charge demand, collect or receive from any person or persons a greater or less compensation for the transportation of persons or property, or for any service in connection therewith, between any points as to which a joint rate, fare or charge is named thereon than is specified in the schedule filed with the commission in force at the time."

Sec. 8 of the Act, (Ibid, p. 3159) provides civil penalties for violation of Act, and Sec. 10 (pp. 3160-61), provides heavy penalties against both carrier and shipper, and declares that any person (p. 3161),

“Who shall knowingly and wilfully, by false billing, false classification, false weighing, false representation of the contents of the package, or false report of weight, or by any other device or means, whether with or without the consent or connivance of the carrier, its agent or agents, obtain transportation for such property at less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor,” etc.

By the same section it is made a misdemeanor for any person to induce a carrier “to discriminate unjustly in his, its, or their favor as against any other consignor or consignee in the transportation of property.”

By the amendatory act of Feb. 19, 1903 (U. S. Comp. Stat., Supp. of 1903, p. 363), it is further provided at p. 364:

“It shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect of the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof, whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced,” and a heavy penalty is imposed.

In view of the fact that the Supreme Court of the United States, has held that amendments to the Act, made subsequent to the shipment in question, may be looked to to determine the construction to be placed upon any given portion thereof, we beg to refer the court to Sec. 6 of the Act as amended by the Act of June 29, 1906.

That the amended section was the plain intent of the original Act has many times been held by the Commission.

No service, privilege or facility may be extended to a shipper by a carrier which is not provided for and set out in the filed and published tariff.

It is clear that the facility and service of specially expedited transportation, or transportation by a particular connection or train is such that it requires publication to be lawful.

Barnes on Interstate Transp., Sec. 415.

Elliot on R. R. (2d Ed.), Sec. 1684.

Shiel v. I. C. R. Co., et al., 12 Int. Com. R., 211.

Diamond M. Co. v. B. & M. R. Co., 9 Int. Com. Com. Rep., 311.

St. L. H. & G. Co. v. M. & O. R. Co., 11 Int. Com. Com. Rep., 90.

Re rates and practices of M. & O. R., 9 Int. Com. Com. Rep., 373, at page 386.

Re rates on cotton, 8 Int. Com. Com. Rep., 121.

Com. Club of Duluth v. N. P. R. Co., 13 I. C. C. Rep., 288.

Victor Fuel Co. v. A. T. & S. F. R. Co., 14 I. C. C. Rep., 119.

K. C. Hay Co. v. St. L. & S. F. R. Co., 14 I. C. C. Rep., 631.

Follmer & Co. v. G. N. R. Co., 15 I. C. C. Rep., 33.

Nat. L. Co. v. S. P. L. A. & S. L. R. Co., 15 I. C. C. Rep., 434.

Barrett Mfg. Co. v. Cent. R. Co., 17 I. C. C. Rep., 464.

Armour Car Lines v. So. Pac. R. Co., 17 I. C. C. Rep., 461.

Beale & Wyman R. R. Rate Reg., Sec. 748.

This construction, namely, that the giving of a greater service in consideration of the tariff rate than is noted in the tariff is unlawful, is enforced and sanctioned by the amendatory acts of 1906, which provides in specie against the very thing which the Commission has already provided against by construction of the Act before that amendment. (Act of June 29, 1906, Pub. Acts No. 337; Supplement of 1909 U. S. Comp. Stat. "Amendment of Act Feb. 19, 1903," page 1155.)

"Nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

The case of *Tex. P. Ry. Co. v. Ab. Cotton Oil Co.*, 204 U. S., at 447, is cogent authority for looking to amendments of the Act subsequent to the arise of the cause of action as a means of justifying the judicial construction of the Act before amendment.

In that case the court says:

"That the result of such long continued, uniform construction has not been considered as harmful to the public interests is persuasively demonstrated by the fact that the amendments which have been made to the act have not only not tended to repudiate such construction, but, on the contrary, have had the direct effect of strengthening and making, if possible, more imperative, the provisions of the act requiring the establishment of rates and the adhesion by both carriers and shippers to the rates established until set aside in pursuance to the provisions of the act."

We therefore have a complete system laid down by the Congress for the government of shipper and carrier, which is framed with great particularity to compel strict adherence by carrier and shipper to the published rates and the service to be performed for those rates, under heavy penalties for any departure therefrom, and to prevent discrimination in any form or by any device.

As shown in our statement the Alton had complied in every respect with the provisions of the Act with reference to filing and publishing its joint tariffs.

These tariffs consisted of three documents, all of which must be construed together to arrive at the rate, and the service to be given for that rate, viz., the Official Classification (Exhibit D), the Joint Interstate Tariff (Exhibit E), (Trans. 126) and the List of Stations Taking Percentage Rate Bases, referred to in the note to Exhibit E (Exhibit K), (Trans. 170).

These documents must be read together to arrive at the rate and service to be performed for the rate.

"The rate sheet, standing alone, does not constitute the schedule of rates required by the law, but is only a part of it; the other part being the Official Classification referred to in it, and filed with it; and the two must be read together, as component parts of the schedule of rates."

Man. Ins. Co. v. Erie & W. T. Co., 75 N. W., 62.

In order to determine the service which Kirby could demand or receive in consideration of the rate paid, and the only service to which he could be entitled, or which the Alton could lawfully give, we must look to the Classification and Rate sheets above mentioned, and if authorization therefor is not found, therein a contract therefor is unlawful.

Kirby was shipping race horses of value far in excess of the ordinary animal without paying the commensurate rate, and was claiming the right to have them transported, not under the common law obligation, viz., with reasonable expedition, but by a special service, far more valuable than the service which would fulfill the common law obligation, which service was not authorized by any tariff provision.

The classification sheet is binding on both carrier and shipper.

Smith v. G't N. Ry. Co., 107 N. W., 56.

The elements of classification are those that "affect either the cost or risk of carriage to the carrier, or the value of carriage to the shipper."

So the elements must necessarily be important which impose a great degree of care on the carrier.

Beale v. Wyman R. R. Rate Reg., Sec. 586.

Then, too, the risk of loss or damage and the liability for the same is a matter which the carrier may take into consideration in fixing its rate. The risk of loss or damage by breach of a special contract for specially rapid service would legitimately increase the rate, and therefore the special service should not be performed for the tariff rate for common law service.

Millinery Jobbers' Asso. v. Am. Exp. Co.,
20 L. C. C. Rep., 498.

The rate quoted to appellee by the agent of the Alton was 65 cents per hundred pounds, minimum 20,000 pounds (Trans., 169), subject to the Official Classification (Trans., 171) as is shown by the notation on the face of Exhibit E and of Exhibit K. (See first pages of exhibits found respectively at pp. 126 and 170 of the transcript.) The Official Classification on every page, in large letters at the top of the page contains a notification, "Property shipped not subject to Uniform Bill of Lading Conditions will be charged twenty (20) per cent. higher than is herein provided (subject to a minimum increase of one (1) cent per 100 lbs.) and cost of marine insurance. (See Rule 1.)"

Rule 1 referred to is found on pp. 1, etc., of the Official Classification and contains specific provision with reference to shipment under and not

under Uniform Bill of Lading Conditions. (Exhibit D, Trans., 126.)

The Uniform Bill of Lading is found on page 15 of the classification. (Exhibit D, Trans., 126.)

The Live Stock Classification is found on page 81, etc., of the classification.

Under the Act the rate of 65 cents per 100 pounds had annexed to it the conditions and limitations contained in the rules, regulations, and other statements contained in the classification, and no other contract could have been legally made based on that rate.

That condition of the rate which is of most peculiar applicability to the case at bar is the clause of the regulations contained in the classification on page 83 (Exhibit D, Trans., 126), which is declaratory of the provisions of the Act itself, as follows:

"The company does not agree to transport live stock by any particular train, within any specified time, nor in time for any particular market, and agents must not give receipts containing such guarantee.

Neither will the company be responsible for any loss or damage occurring by the refusal, failure or inability of a connecting line to receive and forward the stock after tender of delivery."

We insist that the contract for the shipment of the horses was that implied by the law from the rate quoted, and no other condition or term could be added to that contract in consideration of that rate, and hence Kirby cannot recover.

It is of supreme importance, therefore, to ascer-

tain to what extent the right to contract between shipper and carrier is controlled by the classification and rate sheets. The rule is well stated in *Smith v. Great Northern R. Co.* (N. Dak.), 107 N. W., 56:

"All contracts entered into with common carriers are presumed to be governed by the classification in force at the time of the shipment. Whether such classification is just or unjust it is nevertheless binding both upon the common carrier and the shipper, so long as the same remains in force. The tariff thus fixed must govern regardless of any contract for a greater or less rate."

If the rate is duly published and thus called to the attention of shippers and consignees, they cannot depend for the lawful rate or charge on what may be quoted by the carrier's agent, but must be guided by the published tariffs themselves.

Suffern v. I. D. & W. R., 7 Int. Com. Com. Rep., 185.

So. Ry. v. Harrison, 119 Ala., 539; overruling *M. & O. R. v. Dismukes*, 94 Ala., 131.

Kinnavey v. Term. Asso., 81 Fed., 802.

B. & O. v. Hamburger, 155 Fed., 849.

Where the rate sheet states that the rates are subject to an official classification filed with the commission which specifically states in detail the rates under a form of bill of lading, called uniform bill of lading, limiting the common law liability, and stating that rates on property not shipped subject to the uniform bill are a specified percentage higher than the reduced rates under the uniform bill, the

schedule was sufficient to inform shippers that the rates given were for carriage with limited liability.

Man. Ins. Co. v. Erie & W. T. Co., 75 N. W., 62.

Church v. Minn., etc., R. Co., 14 So. Dak., 443.

Kirby was presumed to know, upon proof of the due filing and publication of the schedules, that they were in existence, open for his inspection and that his contract must be and was made in accordance herewith, and the rate of 65 cents being quoted and accepted by him, he was presumed to know that he could legally receive therefor only the service permitted by and set forth in the schedules and not a special service.

"It is held that every shipper must be presumed to know of the existence of the schedules, and that they are open for his inspection, and also the terms of the Act rendering invalid every contract of affreightment not made in accordance therewith, and that, therefore, where a contract for an interstate shipment has been made and is sued on, or property rights are made dependent thereon, the shipper must be held to have contracted with reference to, and in accordance with, the rates fixed by the schedules, regardless of the terms of his contract."

16 Am. & Eng. Ency. (2d Ed.), 161.

That this is the established doctrine in this court upon the question is shown by the opinions of this court in the following cases:

Union Pac. R. Co. v. Goodridge, 149 U. S., 680, at 690, etc.

Gulf, etc., R. Co. v. Hefley, 158 U. S., 98.

Tex. P. R. Co. v. Cotton O. Co., 204 U. S., 426, at 439.

Armour P. Co. v. U. S., 56, at 72 and 80-81.

Tex. P. R. Co. v. Mugg, 202 U. S., 242.

L. & N. R. Co. v. Mottley, 219 U. S., 467, at 476-478.

It goes without saying that a contract to perform an additional and special service for Kirby for the regular schedule rate is a discrimination in his favor as completely as if he were given the regular schedule service for a lower rate than the tariff rate, or for a different compensation.

Wight v. U. S., 167 U. S., 512.

R. R. Co. v. Mottley, 219 U. S., 467.

It may be easily deduced from the above citations that the courts are definitely committed to a construction of the Interstate Commerce Act which maintains the integrity of the published tariff, and binds the shipper in all contractual relations with the carrier to knowledge of the terms and conditions annexed to a quoted rate, whether he has such actual knowledge or not, on the principle that any other construction would nullify the salutary provisions of the Act with reference to discriminations and preferences.

This being true, the contention of Kirby that he had a right to recover under the contract of guarantee set out in the declaration, upon the testimony in the case, can not prevail.

He could make but the one contract founded on the rate paid and that was not the contract pleaded,

but that evidenced by the rate paid and the rate sheets, viz., a contract for transportation in the regular course of business and delivery in a reasonable time.

Here the attempt is made to recover on a special contract unauthorized by the tariff, discriminatory in its character, and in the teeth of the prohibitions of the Act of Congress. It is only by invoking such a contract that Kirby can recover and we submit, with deference, that this court, in the light of the Act and the decisions under the Act, cannot inaugurate a rule which will enable contracts for special service to be made, discrimination to be practiced, and rebates and drawbacks to be given favored shippers with absolute impunity, under the guise of special contracts not specified, but on the contrary prohibited by the regularly published and filed classifications and tariffs.

III.

NO ACTION CAN BE MAINTAINED IN WHICH THE PLAINTIFF, TO MAKE OUT HIS CASE MUST NECESSARILY INVOKE AID FROM AN ILLEGAL DEMAND OR CONTRACT.

The defendant in error declares upon a contract for special service in consideration of the tariff rate for common law service, and offers evidence of such a contract as a basis for recovery. To prove the case laid in the declaration he must invoke this illegal contract, and hence his action must fail.

The clear distinction between the cases in which a contract is contravention of a statute can be en-

forced and when it cannot, is made in the case of *Connolly v. U. S. P. Co.*, 184 U. S., 540, following *Miller v. Ammon*, 145 U. S., 421.

In that case, on pages 548 and 549, the court lays down the rule:

"The test as to whether a demand connected with an illegal act can be enforced, is whether plaintiff requires *any aid* from the illegal demand to establish his case."

In the case at bar, in order to establish his case, Kirby must rely upon the contract for a special service, not authorized by a published tariff and hence illegal. The question of the illegality is not raised collaterally, but directly, by a direct reliance on proof of an illegal contract.

There is a line of authority, relied upon by the defendant in error in the state courts, distinguishing certain situations from the above, and permitting a recovery upon an illegal contract, by a party not in *pari delicto* with the defendant, where such party has been induced to enter into the contract by fraud, duress or undue influence, but this line of authority has no application here, for to apply the principles of those cases would be to "open the door to fraud and evasion," as was said of the like contention in *C. & O. R. R. Co. v. Maysville B. Co.*, 116 S. W., 1183.

In *Gerber v. Wabash R. Co.*, 63 Mo. App., 145, one of the early cases which consider this subject, the court said:

"In other words, the rates of interstate shipment are not the subject of contract, but are in effect fixed under the law. To hold differently

would be subversive of good policy, and it would tend to nullify the law."

This rule by which relief is given to a party to an illegal contract, not in *pari delicto* with the defendant, cannot apply to the making of a contract, prohibited by statute to both the shipper and the carrier, and penalized upon both the shipper and the carrier.

It must be borne in mind that under the amended act as it was in force at the time of this transaction, a penalty was imposed on both shipper and carrier. And

"this act is not only to be read in the light of the previous legislation, but the purpose which Congress evidently had in mind in the passage of the law is also to be considered."

* * * * *

"It is the purpose of the Act to punish those who give or receive transportation, in the sense of actual carriage, at a concession from the published rates. (*Armour & Co. v. U. S.*, 209 U. S., 56, 72, 74.)

Under such an Act, with such a history, upon which such a construction has been placed by this court, is it possible to hold that the shipper and carrier in violating the Act are not in *pari delicto*, in so far as an attempted enforcement of the contract is concerned?

Where the action is to affirm a contract made in violation of the Interstate Commerce Act, and to recover for a breach thereof, the court will deny any remedy.

"The law, in refusing to enforce such contracts, has not in view the benefit of the litigants

themselves, but questions of public policy, and the protection of the people against the violation of statutes enacted for the public good."

R. & G. R. Co. v. Swanson, 39 L. R. A., 275.

B. & O. R. Co. v. Hamburger, 155 Fed., 849.

In the case of *S. F. & W. Ry. Co. v. Bundick*, 21 S. E., 995, the court says:

"Taking the case in its most favorable light for him" (the plaintiff) "he obtained a rate less than that which ought to have been charged; and granting that he was perfectly honest in the matter, the fact that he secured the reduced rate was due solely to a mistake or mistakes on the part of the company's servants, who were themselves acting with perfect honesty and good faith. * * *

This was an interstate shipment, and therefore must be governed by the provisions of the Interstate Commerce Act. That act prohibits, not only contracting for, but also collecting a less rate than that specified in the schedule of rates in force at the time; and the act requires that such schedule shall be printed, and kept in every station for use by the public. It appeared unmistakably in this case that the railway company had fully complied with the law in reference to providing and keeping the schedule. One of the main purposes of the act in question is to prevent carriers subject to its provisions from making discriminations either for or against any of its customers, and to compel such carriers to observe uniformity and equality in their dealings with all shippers. Therefore it was unlawful for this company to make in Bundick's favor a rate of freight less than that which under the schedule, it was required to charge every customer. It makes no difference whether Bundick was or was not ignorant that the rate named to him was an unlaw-

ful one. Under no circumstances would he be entitled to the benefit of a rate which was denied to other customers. To so hold would be in the very teeth of the statute, and would utterly defeat its purpose to prevent just such discrimination. * * * Besides, he might easily have informed himself upon this point by merely inspecting the schedules which the law required to be kept, and to which, as the evidence discloses, he had ready access. * * *

We are quite certain, under the facts of this case, he had no right to rely on and enforce the illegal contract, which, at best, resulted alone from innocent mistake. Nor has he any right to an action of any kind against the company, to maintain which he must necessarily invoke the illegal contract in question."

See, also,

C. & D. R. Co. v. Maysville B. Co., 116 S. W., 1183, at 1185-1186.

IV.

THE ONLY CONTRACT AUTHORIZED BY THE RATE PAID WAS FOR LIABILITY SUBJECT TO OFFICIAL CLASSIFICATION, I. E., LIMITED TO \$100.00 PER ANIMAL, OR \$1,200.00 PER CARLOAD.

The classification specifically provides (Official Classification, p. 83, being Exhibit D, Trans., 126):

"The rates and classification of live stock given in this tariff *are based upon* the following maximum valuations: * * *

If horses or mules (including stallions or jacks), not exceeding \$100.00 each."

On page 85 of Exhibit D an alternative rate is made for values in excess of that used as the rate basis for the 65 cent rate.

The element of value may properly be taken into consideration in fixing the rate.

"The greater the value the greater the carrier's liability as an insurer of freight, and the greater therefore, the risk to the carrier of the transportation."

Beale & Wyman R. R. Rate Reg., Sec. 590
et seq.; Sec. 926.

17 Am. & Eng. Ency. (2d Ed.), 133.

And carriers may make their rates depend on the value of the animals given by the shipper.

Hart v. Pa. R. R. Co., 112 U. S., 331.

Duntley v. B. & M. R. Co., 66 N. H., 263; 20
Atl., 327.

Squire v. N. Y. Cent. R. Co., 98 Mass., at 245.

The liability of the carrier to the shipper, wholly independent of any limitation of liability contained in the contract executed by Kirby (Trans., 162), and solely from the standpoint of the classification, is only that liability for which Kirby paid, viz.: common law service with liability limited to \$100 per animal, or \$1,200 per earload.

We have here no question as to the right of a carrier to limit its liability by contract,—on the contrary we have a limitation imposed by the law itself, binding on shipper and carrier, irrespective of any contract they may have sought to make. For when the rate is legally made, based on elements which may properly be taken into consideration in determining a rate, and the act is complied with by publication and filing, *the rate and service and conditions annexed thereto are immutable, no longer the*

subject of voluntary change or modification on the part of either shipper or carrier.

T. & P. R. Co. v. Abilene C. O., 204 U. S., at 439.

Neither can claim more than grows out of the payment of the rate, which has annexed to it a valuation basis in the nature of those

“rules and regulations which in anywise change, affect or determine any part or the aggregate of such aforesaid rates and fares and charges.” (Sec. 6.)

which are required by the act to be published.

The classification and tariffs offer to the shipper alternative valuations upon payment of greater rates, and when the shipper pays the lower rate, he does it with presumed knowledge of the contents of the classification and tariff, and presumed intent to accept the lower valuation liability in consideration of the lower rate.

In *Mannheim Ins. Co. v. E. & W. T. Co.*, 75 N. W., 602, the precise question now under discussion arose.

There a common carrier had filed and published its joint interstate tariff, consisting of the Official Classification and the rate sheet, just as the Alton had done here. The classification contained almost the identical provisions contained in Exhibit D, including the Uniform Bill of Lading. A dealer in flour had been accustomed for years to ship to foreign ports, receiving and accepting a uniform bill of lading. He had never read the tariffs or had his attention called to them and denied any knowledge of any rate to the seaboard except 12 cents per 100

pounds (the rate subject to Uniform Bill of Lading conditions).

The shipment of flour was destroyed by fire while in defendant's warehouse, without negligence of defendant. The loss was paid by the insurer, who brought action against defendant, who defended on the ground that it was exempted from liability under the contract which the rate of 12 cents per 100 pounds evidenced. The court said, after discussing the documents which evidenced the rate, and their effect:

"In this case, under the evidence and findings of the court, Sheffield (the shipper) knew, or is chargeable with knowledge of the contents of the Official Classification and that the rate sheet, or joint east-bound interstate tariff, was to be used in connection with and subject to, the Official Classification. With this knowledge, he consented and agreed to ship his property under the Uniform Bill of Lading, and thereby assented to and accepted all its terms and conditions."

It is wholly immaterial for our present case, whether the shipper executed the Uniform Bill of Lading or whether he had any actual knowledge that there was such a document. The limitation is not based on the Uniform Bill of Lading as an independent document, nor is the application of the limitation dependent on the assent or absence of assent to that document, but upon the tariff and classification duly published and filed.

The limitation of valuation expressed in the classification is not a mere subsidiary incident to the main matter of the rate, it is an essential element in the determination of the rate, and the classification so

states. (Exhibit D, p. 83, Trans., 126.) The question of a maximum valuation in case of loss is essential to the fixing of an alternative rate, because both the element of value, and the element of damage, in case of loss are properly used as determinative of the rate to be charged.

Here Kirby paid a rate of 65 cents, which entitled him to carriage under the common law liability with an agreed valuation of \$100 per animal or \$1,200 per car.

The trial court, at the instance of Kirby, charged the jury that he might recover all damages, without reference to the agreed valuation. (Trans., 190-191.)

The concrete question before the court on this branch of the case, then, is:

“If the published classification and rate sheets of a carrier base an optional reduced rate upon a maximum valuation, can a shipper who has paid that reduced rate sustain a recovery in excess of the valuation on which his rate was based?”

This question was not raised or passed upon in the case of *Penn. R. Co. v. Hughes*, 191 U. S., 477, upon which great reliance was placed by Kirby in the Illinois courts, and so far as we are advised, is now before this court for the first time.

In the *Hughes* case, the defense was made that liability was released by the *shipping contract* to a valuation of \$100.

No contention was made (nor would the record in that case support such a contention), that by virtue of the Congress entering the field of legislation concerning the method by which a rate must be es-

tablished, and legislating as to the conditions precedent to the establishment of a rate, the state rules which would impair the integrity of the rate when made and promulgated in accordance with the act of Congress, must give way.

Our contention goes back of the shipping contract to the rate itself, evidenced by the classification and tariff, and we submit that inasmuch as Congress has outlined the procedure by which that rate is to be established, thereafter to be binding on shipper and carrier, and the classification and tariff have been duly promulgated according to law, the rate thereby made is no longer the rate imposed by the carrier, but the rate imposed by law.

This rate, so imposed, cannot be departed from until changed by the legal method.

"A rate, so long as it remains uncanceled, is as fixed and unalterable, either by the shipper or by the carrier as if that particular rate had been established by a special Act of the Congress. * * * Not even a court may interfere with a published rate or authorize a departure from it when it has been established voluntarily by the carrier."

Poor Grain Co. v. C., B. & Q. R. Co., 12 I. C. C. Rep., 418.

Here the Congress has entered the field and hence, in that field is paramount; the rate and conditions annexed to the rate, cannot be affected or their integrity impaired by State legislation or common law construction.

Again, in the *Hughes* case, it was not basis of the rate in the *tariff* (*i. e.*, the valuation) which was

brought to the attention of the court as the ground for exemption, but a stipulation in the *shipping contract*, control of which the Congress had never taken.

The sole question was on the validity of the limitation of liability in the shipping contract, and this court said that that was not a question of Federal law wherein the decision of the highest Federal tribunal is of conclusive authority, but here a wholly different question is presented. The Classification and tariff were promulgated in obedience to the Act of the Congress; they contained the rules and regulations which in anywise change, affect or determine any part or the aggregate of such aforesaid rates and fares and charges." (Sec. 6, Interstate Commerce Act), and among the things upon which this rate was based was the element of value. If this element can be stricken from the tariff by some State statute or common law construction, the integrity of the rate is gone. The principle of uniformity, which is said to be the vital principle of the Interstate Commerce Act, (*Poor Grain Co. v. C., B. & Q. R. Co.*, 12 I. C. C. Rep., 418), can only be maintained by keeping fixed the basis of the rate by the rules and regulations promulgated in the schedules. When a rate has been once established it is wholly immaterial what the rule in Illinois or Pennsylvania may be as to the justifiability of the basis of the rate. It can only be changed by application to the Interstate Commerce Commission.

The rate in the case at bar was fixed by the Classification and tariff at 65 cents, based on the \$100

per animal, \$1,200 per earload valuation. The Classification and tariffs were required by Federal law. The elements going into the rate and which may lawfully be annexed to the rate are therefore for determination of the Interstate Commerce Commission. It is wholly immaterial whether Kirby actually knew of the valuation or not, or whether he agreed specifically to it. The valuation is as much a part of the rate as the minimum earload or even the measure of so many cents "per 100 lbs."

If there be any recovery at all it can not be for more than the \$100 per head or \$1,200 per earload, and the case must be reversed for that reason if no other.

V.

ERRONEOUS CONSTRUCTION AND APPLICATION OF FEDERAL CASES BY SUPREME COURT OF ILLINOIS.

The Supreme Court of Illinois placed much reliance upon the case of *Merchants' C. P. & S. Co. v. Ins. Co.*, 151 U. S., 368. (Trans., 246.)

This reliance is based upon a misapprehension of the pleadings and facts in the case at bar and the state of the law at the time the Cotton Press case arose.

It must be borne in mind here, that defendant in error declares upon a contract which the proof shows it was unlawful for him to make, and no recovery can be had save by reliance upon that contract.

In the *Merchants' Cotton Press* case, *supra*, there was no contract for a special service, not noted in

the tariffs as here. The contract of affreightment was perfectly valid, and the complainant required no aid from the illegal portion of the transaction to establish his case. The contract for a rebate was severable from the remainder of the transaction, and in that case the language of the opinion of the Supreme Court of Illinois in the case at bar (*Trans.*, 246) would apply, for there the transportation company had only to disclaim the illegal portion of the transaction and collect its proper rate; or, on the other hand, the consignee could pay the proper rate and relieve the contract of the taint of illegality. In the case at bar there was no rate filed and published according to law for which the carrier could agree to perform the specially expeditious service, and hence no such agreement could lawfully be made. There was no "proper rate" for that service.

To recover damages for the loss of the property in transit, the consignee in the Cotton Press case required no aid from the illegal feature of the contract, here it is the sole basis of recovery, *i. e.*, the failure to give the special service.

It is also noticeable that in that case the rebate was given to certain brokers, not the real parties in interest in the contract of shipment, and the court says:

"Jones Brothers and Company were either the agents of the owners or consignees or the sellers thereof to eastern consignees, and the rebates or drawbacks, which they claim to have been allowed, if allowed at all, according to the testimony of one of the members of the firm

was a private benefit which the firm secured, and, for as as appears, without the knowledge or consent of the owners or consignees of the cotton. Under such circumstances, if such rebates were paid or allowed to the firm by the agent of the railroad company, it is difficult to understand upon what principle such an allowance would vitiate or render void the bills of lading which the railroad company issued to the owners of the cotton."

A further consideration, which seems conclusive that a misapprehension of the Cotton Press case has influenced the State Supreme Court in its judgment in the case at bar, is that the Interstate Commerce Act with its amendments in force at the time Kirby claims to have made his contract for the special service was a very different statute from that in force in November, 1887, the date of the accrual of the cause of action in the Cotton Press case. (See 151 U. S., at 371.) The original Interstate Commerce Act is the Act of February 4, 1887, and its provisions look to regulation of the carrier only, there being no provision in the four corners of the statute making any act of the shipper unlawful or punishable. The sections of the original act declaring any conduct of any person unlawful are those numbered 2, 3, 4, 5, 6 and 7, and the penalty clause is contained in section 10. Each of these sections declared some conduct of the carrier unlawful, or prohibits the carrier from doing some act described and the penalty clause inflicts penalties upon the carrier.

No section of the Act of February 4, 1887, which was the Act this court had under consideration in the Cotton Press case, declares any contract *of the*

shipper unlawful, or prohibits the *shipper* from doing anything or imposes any penalty on the *shipper*. Specified conduct of the carrier only is declared unlawful, and therefore the holding in that case that the contract for the rebate was void, but the contract of affreightment was not otherwise void, is strictly in accordance with well established principles.

So it will be seen that inasmuch as the Act of February 4, 1887, prohibits and makes unlawful certain conduct of the carrier for the benefit of shippers at large, it would have been highly improper in the Cotton Press case to hold that the prohibited act of the railroad would invalidate the contract of carriage and thus militate against the shipper, to whose protection the then Act solely looked, and against whom no prohibitions or penalties were directed.

This situation was apparently recognized by the Congress, for by the Act of March 2, 1889, amendatory of the Act of February 4, 1887, section 10 of the original Act was amended by the addition of prohibitions against the shipper and penalties for violation of the Act by the shipper. Later, the Congress further realizing that to make the regulation of commerce effective, the carrier and shipper must both be subjected to prohibitions and penalties, passed the amendatory Act of February 19, 1903, making it unlawful for any person "to solicit, accept or receive any rebate, concession or discrimination * * * whereby any such property shall by any device whatever be transported at a less rate

than that named in the tariffs published and filed by such carrier * * * or whereby *any other advantage* is given or discrimination is practiced," etc.

This was the situation at the time Kirby entered into a contract which is indisputably discriminatory, and not authorized by any published tariff. Under the law then in force, the contract itself was expressly declared unlawful, and Kirby was *in pari delicto*, with the Alton upon his own testimony. Under no authority is there any justification for enforcement by a court of plainly illegal contract, so declared by statute, where by the statute the parties are *in pari delicto*.

In the Standard Oil case, (155 Fed., 305,) Judge Landis held in a criminal prosecution against a shipper, where the indictment charged that the shipper "knowingly" accepted and received a concession of a rate less than the tariff rate, that knowledge would be presumed. (See page 312 *et seq.*) The Circuit Court of Appeals reversed Judge Landis (See 164 Fed., 376), holding that under such an indictment actual knowledge of the tariff must be shown. But this holding does not militate against the position of the Alton in the case at bar. Here no penalty is sought to be recovered under the penal provisions of the Act, and the strict construction applied to penal actions will not be resorted to.

The question in the Standard Oil case is stated by Judge Grosscup as follows, in discussing the charge of Judge Landis:

"Of course, if this view of the law is sound, the action of the court, in its rulings on the evidence offered, as well as its charge, is with-

out error; for if a shipper can be held guilty of accepting a concession from the lawful published rate, even though the shipper had no knowledge of what the lawful published rate was—if the plaintiff in error, in the transactions before us, was bound, at its peril, first to successfully disentangle the Alton's confused tariff sheets, and then correctly to interpret them—the evidence excluded could have had little determinative weight in any judgment of the jury upon the guilt or innocence of the shipper. But if, on the contrary, it is necessary to a conviction of a shipper of accepting a concession from the lawful published rate, *that it should appear as bearing on intent*, that the shipper knew what the lawful published rate was, the evidence offered and excluded clearly relates to the fact of such knowledge, and was erroneously excluded, because the plaintiff in error was thereby deprived of its right to have the judgment, not of the court alone, but of the jury as to whether the plaintiff in error had such knowledge as charged him with *an intent to violate the law*. Indeed, the whole question is the fundamental one of whether a shipper is guilty, under the Interstate Commerce Act, of having accepted a rate less than the lawful published rate, even though he does not know, at the time, that the rate accepted was in fact less than the published rate, thereby having no intent to violate the law; or, as the Supreme Court stated the question in *Armour Packing Company v. United States* (decided March 16, 1908), 209 U. S., 56, 28 Sup. Ct., 428, 52 L. Ed.—whether ‘shippers who pay a rate under the honest belief that it is the lawful published rate, when in facts it is not, are liable, under the statute because of a duty resting on them to inform themselves as to the existence of the elements essential to establish a rate as required by law.’ ” (page 381.)

The distinction between the criminal action for a

penalty and a civil action on the unlawful contract is nicely made in *C. & O. R. Co. v. Maysville B. Co.*, 116 S. W., 1183, at 1185-1186:

"This is not a case where it is sought to punish the shipper for obtaining a preferential rate contrary to the statutes. In such a case, in order to show guilt, it may be necessary to show knowledge. It is simply a case where the shipper seeks to obtain damages for violation of a contract which is illegal and unenforceable. No right of action can be predicated on a contract that is contrary to public policy and void. * * * While it may be true that this interpretation of the statute may work a hardship in this particular instance, it is also true that it is the only interpretation that will make the constitution and the statutes effective. To hold otherwise would be to open the door to fraud and evasion. If the shipper in ignorance of the rate charged other shippers for a like service could obtain a preferential rate, and then sue and recover the difference between that rate and the regular rate charged other shippers for a like service, there would be nothing to prevent the railroad from establishing a system of rebates by which the law could be utterly defeated. Manifestly the transportation company would be authorized to refund to the shipper that which the latter could sue for and recover."

The Supreme Court of Illinois also misconceives the effect of the holding of Mr. Justice Jackson in *Int. C. Com. v. B. & O. R. R.*, 43 Fed., 37 (Aff., 145 U. S., 263) quoted in *T. & P. R. Co. v. Int. Com. Com.*, 162 U. S., 197. (Trans., p. 245.)

The Illinois court deduces from this holding that a carrier is free to make special contracts in relation to transportation and carry them out, *without tariff* authority for the same. A consideration of

the opinion of Mr. Justice Jackson, and of the opinion of this court on affirmance, shows that the quoted words of the learned justice will bear no such construction as that placed upon them by the Illinois court. No question of the right of the carrier to make a special contract, not provided for by a published tariff arose in that case.

The Illinois Supreme Court also relies upon *So. Pac. R. Co. v. Int. Com. Com.*, 200 U. S., 563, as announcing the same rule.

An analysis of this case shows that the quotation of the holding of Mr. Justice Jackson (p. 554 of the opinion) was merely to the effect that special contracts might be made, if they had been authorized by a duly published tariff. In the *Southern Pacific case the tariff contained the special provisions as to routing*, (Statement of Case on p. 538) and the tariff was attacked. The quotation was in justification, of the right to make a special routing agreement *by tariff*, not of the right to make such an agreement independent of or contrary to any tariff provision.

No construction of the Act can be found justifying special services not noted in the tariff.

VI.

THE CASES RELIED UPON BY DEFENDANT IN ERROR TO SUSTAIN THE JUDGMENT ARE INAPPLICABLE TO THE PLEADINGS AND FACTS IN THE CASE AT BAR.

In anticipation of the contentions of the defendant in error which will no doubt appear here as they were the principal reliance in the State courts, we

desire to impress our view that there is not here involved any vexing question of the right of a carrier to limit its liability for negligence, either ordinary or gross. No such question could arise on the pleadings, nor does it arise on the testimony, for neither negligence nor unreasonable delay is charged in the declaration or shown by the proof. We have here a simple allegation of special contract and breach, with proof that the contract relied upon was one which neither the Alton nor Kirby could lawfully make, and which the Alton denies that it made or sought to make.

Kirby is not seeking to recover damages for the loss of goods by negligence, with the illegality of the contract a mere incident to the shipment, but is basing his right to recover on the enforcement of the illegal contract itself.

The cases of *Penn. R. R. Co. v. Hughes*, 191 U. S., 477, and *Chi. & N. W. R. R. Co. v. Solan*, 169 U. S., 133, are plainly distinguishable from the case at bar. In both of those cases the action was in tort for negligence, and the question raised and decided was whether, in the absence of congressional legislation on the subject, a state statute (in the Solan case), or an interpretation of the common law (in the Hughes case), prohibiting a railroad company from limiting its liability by contract was an illegal infringement on the power of the Federal Government over interstate commerce. This court, in both cases, upholds the right of the state to refuse to sanction contracts limiting the liability of common carriers, but on the express statement that the state

has the right because Congress has not legislated on the subject.

In the Solan case (pp. 137-138), the court says:

“So long as Congress has not legislated upon the particular subject they (state regulations), are rather to be regarded as legislation in aid of such commerce.”

In the Hughes case (p. 487), the court says:

“It may be assumed that under the broad power conferred upon Congress over interstate commerce as defined in repeated decisions of this court, it would be lawful for that body to make provision as to contracts for interstate carriage, permitting the carrier to limit its liability to a particular sum in consideration of lower freight rates for transportation.”

The opinions then proceed upon the line that inasmuch as Congress has not legislated upon this subject, the legislation or judicial interpretation of the common law of the states is not an interference with interstate commerce.

The converse of this proposition, namely, that in so far as Congress *has* legislated upon the question, a state statute in conflict with such legislation is unenforceable and void, is found in *G., C. & S. F. R. Co. v. Hefley*, 158 U. S., 98. In that case it appeared that the State of Texas had enacted a statute making it unlawful for a railroad company in that state to charge and collect a greater sum for transporting freight than was specified in the bill of lading. The Supreme Court of the United States held such statute to be in conflict with the provisions of the Interstate Commerce Act requiring the collection of the tariff rate shown by the published schedules, and

therefore void as to interstate shipments. The court says (*loc. cit.*, 102):

"Clearly the state and the national acts relate to the same subject matter and prescribe different rules. By the state act, the bill of lading is made controlling as to the rate collectible, and a failure to comply with that requirement exposes the delinquent carrier to its penalties, while the national statute ignores the bill of lading and makes the published tariff rate binding, and subjects the offender, both carrier and agent, to severe penalties. The carrier cannot obey one statute without sometimes exposing itself to the penalties prescribed by the other. Take the case before us: If, in disregard of the joint tariff established by the defendant and the St. Louis and San Francisco Railway Company, and filed with the Interstate Commerce Commission, the latter company, as a matter of favoritism, had issued this bill of lading at a rate less than the tariff rate, both the defendant company and its agent, by delivering the goods upon the receipt of only such reduced rate, subject themselves to the penalties of the national law, while, on the other hand, if the tariff rate was insisted upon, then the corporation would become liable for the damages named in the state act. In case of such a conflict the state must yield."

This extract applies with decisive force to the situation at bar.

Under the rule contended for by Kirby the court is asked to hold a contract for a special service, which affects the value of the services performed, which is not mentioned in the tariff, but which, on the contrary is expressly prohibited by the tariff, to be a valid contract, and to affirm a judgment for damages, based on an alleged non-performance

of the contract. To make such a contract, or to carry it out if made, for the consideration of the tariff rate, would unquestionably result in a violation of the provisions of the Interstate Commerce Act, requiring that no discrimination or favoritism be practiced, because it would be granting to Kirby of a special service of value, under a tariff which precludes the granting of such special service in express terms. Whether Kirby would or would not be punishable for accepting the discriminatory rate, without actual knowledge that it was not permitted by the tariff, in any event he cannot procure a court to sanction and uphold the illegal contract, by giving him relief, which can be given only by a holding that will ignore the plain intent and purpose of the Interstate Commerce Act.

The contention of Kirby, based on the *Hughes* and *Solan* cases is that inasmuch as those cases hold that a state statute or common law construction in an action of tort for negligence may lawfully nullify a provision in a *shipping contract* limiting liability for loss or damage,—therefore a special contract for a special service, *not provided for in the tariff*, to be rendered in consideration of the tariff rate for common law service is not unlawful.

As we have heretofore shown, the rendering of a special service not noted in the tariff and not open to the public, is invalid, as in violation of the spirit of the act.

Our position is not that there can be no recovery because of the limitations of liability in the shipping contract which was the contention in the *Hughes*

and *Solan* cases, but that the contract claimed is contrary to the *tariff*.

The error in the position of Kirby lies in the assumption that the provisions of the tariff and of the act itself, by virtue of which the tariff exists, are to be construed as of no more force or virtue than a limitation of liability inserted in a shipping contract without legislative authority.

The clause of the classification providing against discriminatory contracts, is a specific application of the general prohibitions of the Act itself, and the insertion thereof in the classification being merely declaratory and in aid of the purpose of the Act; neither strengthens nor impairs its efficacy, but merely brings home to shipper and carrier the specific application of the general inhibition against discrimination. In the situations treated in the *Hughes* and *Solan* cases, viz., limitations of liability by shipping contracts, the field had not been entered by federal legislation, but in the field of discrimination by special contracts for special services to individual shippers, the Congress has legislated, and hence the state rules must give way. Thus, irrespective of the clause in the classification prohibiting an agreement to transport live stock by any particular train, within any specified time, or in time for any particular market, the Act itself prohibits any such special contract made in consideration of the ordinary tariff rate, when it prohibits discrimination between shippers.

The Congress has not declared that railroads may, by contract, limit their liability, but the Congress

has declared, as the Act has been construed, that neither carrier nor shipper may enter into a contract not covered by tariff insuring to the shipper a special service which will discriminate in his favor against his competitor who has not such a special contract.

It may be further answered that neither in the *Solan* case nor in the *Hughes* case was the point made or decided that to hold the carrier to a liability in excess of that for which the rate was compensatory under the tariff, would be discriminatory, and hence the assumption that these cases hold that the maximum liability clause in the tariff does not render the contract for a higher liability at the schedule rate discriminatory is unwarranted.

IX CONCLUSION.

We submit, with deference, that this judgment, which was rendered for a loss suffered by reason of the breach of an alleged unlawful contract for a special service, not provided for, but on the contrary prohibited by the published tariff in force at the time of the transaction, cannot be affirmed without opening the door to fraud and evasion of the purposes of the Act.

To hold damages recoverable for a breach of such a contract

“Would open the door to the grossest frauds upon the law, and practically enable the railroad company to avail itself of any consideration for a rebate which it considers sufficient, and to agree with the favored customer upon

some fabricated claim for damages which it would be difficult, if not impossible, to disprove."

L. & N. R. Co. v. Mottley, 219 U. S., 467;
I. C., 478.

We submit also that the judgment for Forty-two Hundred (\$4200.00) Dollars is so apparently upon an untenable theory of unlimited liability and so clearly denies to plaintiff in error a right, title, privilege and immunity claimed under the Interstate Commerce Act as in force at the time the alleged cause of action accrued, that it must be reversed.

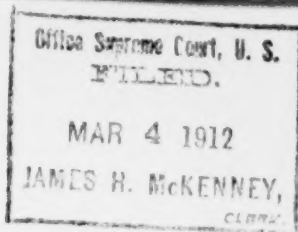
All of which is respectfully submitted.

SILAS H. STRAWN,

WILLIAM PATTEN,

GARRARD B. WINSTON,

Counsel for Plaintiff in Error.



IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1911.

No. 226

THE CHICAGO & ALTON RAILROAD
COMPANY,
Plaintiff in Error.

vs.

NATHANIEL T. KIRBY,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

JAMES M. GRAHAM,
ALBERT SALZENSTEIN,
Counsel for Defendant in Error.

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The statement of counsel for plaintiff in error omits some matters which we believe should be presented, and we therefore make this additional statement. The substance of plaintiff's declaration is stated in the opinion of the Supreme Court of Illinois, as follows:

“The declaration, in one count, alleged, in substance, that on January 24, 1906, appellant, in consideration that appellee would ship a cer-

tain car-load of high-bred trotting horses over its road which he was intending to ship to New York City during that month to be sold at a sale of high-bred trotting and pacing horses at Madison Square Garden, promised appellee that said stock should be carried by it over its lines to Joliet, Illinois, and then over the lines of the Michigan Central Railroad Company by a fast stock train, known as the 'Horse Special,' to New York City, for the sum of \$170.60; that appellee, relying on said promises, on January 24, 1906, paid the said sum and delivered to appellant, for transportation, the said car-load of horses, and that it was received by appellant under the terms and agreement aforesaid, and that it thereby became the duty of appellant to carry said car-load of horses in accordance with the terms of said agreement, but that, wholly disregarding its duty in that behalf, appellant did not deliver said car-load of horses to the Michigan Central Railroad Company so that they could be carried on the Horse Special to New York City, but neglected and failed so to do, and by reason of such neglect and failure appellee was obliged to have them carried by a later train and by inferior and slower means of transportation, whereby said stock was delayed in transit more than forty-eight hours and reached the destination too late to be put in proper shape for exhibition and sale at said horse sale, and that by reason of such delay and inferior transportation all of said horses were damaged and depreciated in value and several of them became sick, etc."

To this declaration defendant interposed the general issue. A trial by jury was had resulting in a

verdict in favor of plaintiff for \$4200.00. A motion for a new trial was made and overruled and judgment given on the verdict. An appeal was then prayed and perfected to the Appellate Court for the Third District of Illinois. In that court the errors assigned and argued were that the contract declared on was not made; that the agents of defendant, with whom plaintiff dealt, had no authority to make the contract declared on; that plaintiff was bound by the written contract; that the contract violated the Inter-State Commerce Act, and that therefore plaintiff was not entitled to recover thereon. No question was made that if plaintiff was entitled to recover, he had sustained the damages assessed. The Appellate Court affirmed the judgment of the Court below. The opinion of the Court is published in Vol. 146 Illinois Appellate Court Reports, page 31. The Court found that under the evidence the contract declared on was made; that the agents making it had authority to make it, that plaintiff had not agreed to the written contract and that the contract made did not violate any of the provisions of the Inter-State Commerce Act.

An appeal was taken to the Supreme Court of the State of Illinois, and there the judgments of the Appellate and Circuit Courts were affirmed in an opinion written by the late Justice Guy C. Scott, deceased. The substance of the opinion is found on pages 228 to 231 inclusive of the transcript in this case. A rehearing having been applied for and granted, the cause was reargued and the judgments

of the lower Courts affirmed in a *per curiam* opinion found on pages 213 to 220 inclusive, and again on pages 240 to 247 inclusive, of the transcript in this case. The opinion was published in the official reports and appears in Volume 242, Illinois Reports, commencing on page 418. An impartial statement of the facts appears in that opinion.

A matter which is not there stated and which may be of some importance is that plaintiff was obliged to pay \$200.50, for the shipment instead of \$170.60, the price given him. Ten dollars of this was afterwards returned to him, leaving \$19.95 paid in excess of the \$170.60. (H. M. Fuller's testimony, Transcript p. 105; Edward A. Tipton's testimony, Transcript p. 105; N. T. Kirby's testimony, Transcript pp. 26 and 118.)

ARGUMENT.

I.

THERE WAS NO UNLAWFUL DISCRIMINATION UNDER THE
INTER-STATE COMMERCE ACT.

The evidence in the case shows that the Horse Special of the Michigan Central Railroad ran to New York from Chicago, Illinois, three times a week and was a service open to all shippers of horses. The Chicago & Alton Railroad and two other lines out of Springfield, Illinois, connected with the Michigan Central, not only at Chicago, but at places where the Horse Special would pass on its way to New York. It has never been questioned, to our knowledge, that the shipper was precluded by anything in the Inter-State Commerce Act, from selecting the route that he desired to ship over. The case of *Southern Pacific Company vs. Inter-State Commerce Commission*, 200 U. S., 585, does not deny this right, but expressly, as we think, recognizes it. In that case it was held that there was nothing in the Inter-State Commerce Act forbidding the adoption by common carriers, as part of an agreement for a through rate from California to the East for oranges and other citrus fruits, of a rule under which the right of routing beyond its own terminal is reserved to the initial carrier, as the condition of guaranteeing the through rates of the shipper, where such rule has served as intended to break up rebating by the connecting lines and in its practical

operation the actual routing is generally conceded to the shipper and his requests to divert shipments *en route* are usually allowed. In the course of the opinion it is said on page 556,

“As has been said, there is no pretense of discrimination under this rule between the shippers of freight themselves. There seems to be unanimous agreement that all shippers are treated alike and granted the same privileges and the routing is generally according to them. It is the power to route which rests with the initial carrier, that really takes away the motive for a rebate, in the manner indicated, and therefore the granting of the request of the shipper as to a particular route may be and is generally conceded without danger that the rebate business may be again practiced.”

The shipper having the right to use the Horse Special in shipping had the right to select the place he desired to connect with it, and in according him that right no privilege or preference of any kind was given him, but he was given what he or any shipper had a right to demand.

This being true, how can it be said that if the carrier agrees with such shipper to handle his shipment so as to connect with the Horse Special at such place selected by him, that such agreement constitutes a contract prohibited by the Inter-State Commerce Act?

In the case at bar the shipper wanted to avoid the jerking and shaking of his horses which would be occasioned in shipping to Chicago, and had been informed by another shipper that the way to do this

was to ship, as this shipper had done, by way of Joliet, and the cut-off. (Kirby's testimony, Transcript, p. 48.) He so told the agent of plaintiff in error who solicited his shipment, and that agent told him he would inquire into the matter and inform him if that could be done and what the rate would be. Subsequently the agent of the railroad company informed him that it could be done and the rate, and the agreement to so ship was made. Kirby, in his testimony, stating that the agent came to his shop and said, "You are shipping just at the right time, Kirby. I says, how is that? He says, well, the Horse Special leaves Chicago, Tuesdays, Thursdays and Saturdays of each week, we will ship you Wednesday night, just as you have mapped out and get you to Joliet at six o'clock in the morning, the train men will pick you up and take you over to Lake on the Michigan Central, and the Horse Special when it comes along will pick you up at five o'clock. I says do I have to stay to five o'clock, he says yes, and you can get on to the fast Horse Special. I says have you made every arrangement to ship me on that Horse Special, he says you will go all right. I turned to him and says, if you have not made every arrangement to ship me on that Horse Special, we will go and ship over the Wabash, and I knew that route, he says, we will guarantee we will put you on the Horse Special." (Kirby's testimony, Transcript, p. 19.)

After the horses were loaded on the car ready to ship, Kirby inquired of the freight agent if all arrangements had been made about this load at Joliet

and the agent said, "Yes, it is marked here on this way bill." "I says that goes to Joliet." Have they made arrangements ahead?" He says they have attended to that." (Kirby's testimony, Transcript, page 20.)

The whole trouble came about in the railroad company not having notified and advised the Michigan Central at Joliet at any time of this shipment until about 10 o'clock A. M., on January 25th, 1906. (Stipulation, Transcript, p. 7.) The evidence shows that the horses reached Joliet at six o'clock A. M., of the 25th, and if the Michigan Central had been properly advised the horses would have been taken from Joliet at about 6 A. M., to Lake, when the regular connections would have been made. In this case there is no evidence or even claim by this railroad company that it was not ready to make the same arrangement with any other shipper. Nor is there anything in this arrangement that we can see which in any way violates either the spirit or letter of the Inter-State Commerce Act.

A case in point is *Foster vs. Cleveland C. C. & St. L. Ry. Co.* 56 Fed. R. 434. That was an action to recover damages on the failure of the carrier to comply with its agreement to connect with a certain other carrier so that a theatre troupe might be carried on time from Peoria, Illinois, to Louisville, Kentucky. The Court there say:

"The action of a railroad passenger agent in guaranteeing that a theatre troupe to whom he sells a party rate ticket shall arrive at their destination at a given time is not the giving of

an undue or unreasonable preference or advantage within the meaning of the Inter-State Commerce Law. The transportation was not, and was not to be, any different from what any party might have had. * * The substance of the guarantee was that such connection should be made at Crawfordsville as would take the troupe through in time. This was not anything undue, but what was due, and if it was not undue, it was not unreasonable. If the connection had been made no liability would have accrued."

(b) This Court in the case of *Texas & P. R. Co., vs. Inter-State Commerce Commission*, 162 U. S., 197, discuss the purpose and construction of the Inter-State Commerce Act, in regard to discrimination, etc., very fully and completely, and hold that all preferences and advantages, if any exist, are not prohibited by the act, and quote with approval the rule laid down by Justice Jackson when Circuit Judge, in the case of *Inter-State Commerce Commission vs. B. & O. Ry. Co.*, 43 Fed. p. 37, (affirmed in 145 U. S., 263), as follows:

"Subject to the two leading prohibitions, that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or advantage or subject to undue prejudice or disadvantage persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally

to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits."

This language is quoted with approval and applied in subsequent cases.

Cincinnati N. O. & T. P. R. Co. vs. Inter-State Commerce Commission, 162, U. S., 197.

Inter-State Commerce Commission vs. Cincinnati & R. Co., 167 U. S., 479 at 493.

Inter-State Commerce Commission vs. Alabama Midland R. Co., 168 U. S., 144 at p. 165.

Southern Pacific Co. vs. Inter-State Commerce Commission, 200 U. S., 536 at 554.

Inter-State Commerce Commission vs. Chicago, G. W. R. Co., 209 U. S., 108 at p. 119.

Gamble Robinson Com. Co. vs. C. & N. W. Ry. Co., 94 C. C. A., 168 Fed. R., 16.

U. S. ex rel. vs. Oregon R. & N. Co., 159 Fed. R., 975.

I. S. C. C. vs. C. G. N. Ry. Co., 141 Fed. R., 1003.

See also 2 Hutchinson on Carriers (3d ed.) § 538.

The Supreme Court of Illinois in deciding the case at bar upon the matter in question say on pp. 429 and 430, Vol. 242, Illinois Reports:

"It is next contended that the contract upon which recovery was had was for a special service not provided for by the published tariffs

of appellant, and if made was void for the reason that it was in violation of the Inter-State Commerce Act, prohibiting discrimination among the shippers. The basis of this contention is found in the fact that the contract as counted upon was to ship by a certain train over the Michigan Central lines, not under conditions of the 'uniform bill of lading,' while the rate was the ordinary rate for the shipment of horses from Springfield to New York under conditions of that bill of lading and by such trains as the carriers might select. The theory is, that the agreement to ship by the Horse Special was a discrimination in favor of Kirby. The Inter-State Commerce Act (3 Comp. Stat., U. S., p. 3155,) requires a carrier to charge the same sum against each shipper where 'a like and contemporaneous service' is rendered to each, and makes a discrimination as to rates unlawful. It also provides for the making and publishing of schedules of rates, which shall contain a classification of freight and any rules and regulations which in anywise change, affect or determine any part or the aggregate of the rates. By the amendatory act of February 19, 1903, (U. S. Comp. Stat. Supp. of 1903, p. 363,) it is provided: 'It shall be unlawful for any person, persons or corporation to offer, grant or give, or to solicit, accept or receive any rebate, concession, or discrimination in respect of the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereto, whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier,

as is required by said act to regulate commerce and the acts amendatory thereto, or whereby any other advantage is given or discrimination is practiced.' It is the provision just quoted which it is contended inhibited the making of a contract by which the horses were to go on any particular train.

* * * *

In the case at bar we think it clear that the railroad company had a right to agree to connect with the Horse Special, and in doing so it did not agree to perform such a special service as to in any way violate the Inter-State Commerce act. The agreement to carry appellee's horses from Joliet to New York on the Horse Special was a legitimate means of procuring business, and there is nothing in the record to show that every other shipper was not entitled to the same privilege and would have been accorded it upon request. Moreover, the evidence tends to show affirmatively that other railroads were ready to accord the same special service to appellee at the quoted and contract rates agreed upon between him and appellant."

II.

IF THE CONTRACT HAD VIOLATED THE INTER-STATE COMMERCE ACT, THE RIGHT TO RECOVER DAMAGES OCCASIONED BY THE NEGLECT AND FAILURE OF THE RAILROAD TO NOTIFY THE MICHIGAN CENTRAL IN REASONABLE TIME TO PROVIDE FOR THE CONNECTION, WOULD STILL EXIST.

In *Merchants' Cotton Press & Storage Co. vs. Insurance Co. of North America*, 151 U. S., 337, that question is decided. That case came to this Court

on writ of error from the Supreme Court of Tennessee. *Insurance Co. vs. Carriers*, 91 Tenn. 538, and the questions therein presented are thus stated by Mr. Justice Jackson who wrote the opinion:

"The writ of error in each of these seven causes (which were submitted together) presents the same federal questions, which are, first, whether the Supreme Court of Tennessee erred in sustaining the action of the chancery court of Shelby County of that State, denying the petition of several of the plaintiffs in error to remove the cause to the Circuit Court of the United State for the Western District of Tennessee; and secondly, in holding that certain alleged special rates, rebates, or drawbacks allowed by Anthony J. Thomas and Charles E. Tracy, receivers of the Cairo, Vincennes & Chicago Railroad Company, through L. L. Fellows, their agent at Memphis, to Jones Brothers & Company, of that place, on cotton shipped over that line to various points in the East, were not in violation of the Inter-State Commerce acts regulating commerce between States of the Union, and did not render the bills of lading issued by the railroad for cotton transported or to be transported so illegal as to invalidate the same and prevent any recovery thereon against the carrier "

The Court then state the facts out of which the controversy arose, from which appears that right of recovery was predicated on the liability of the railroad company for the value of \$700.00 worth of cotton destroyed by fire and shipped under special rebates, etc., then the pleadings and other pro-

ceedings, and then having held that no error was committed in denying the petition for removal came to the remaining question. The opinion thereon appears on pages 387 and 388 as follows: "The remaining assignment of error based upon the alleged allowance by the local agent of the railroad company of special rates, rebates, or drawbacks to Jones Brothers & Company, which, it is claimed, rendered the bills of lading issued by the railroad company to the owners or consignees of the cotton void, so that the marine insurance companies, who had paid the losses, could have no right upon such bills of lading against the railroad company or the fire insurance companies, needs but little consideration." The Supreme Court of the State disposed of this question as follows, (*Insurance Co. v Carriers Co.*, 91 Tenn., 538):

"This fact of special rate and rebate is denied, and it is a matter of controversy and conflict of evidence, and it is also insisted in answer to this by plaintiffs that the Inter-State Commerce law does not apply for the reason that the evidence disproves any 'common contract' over the river and rail rate. *We are of opinion, however, and rest our decision upon the ground that, if it were assumed that the law was applicable, and the fact of agreement for rebate and special rate proven, it would not prevent liability on the part of the carrier for the freight received and covered by insurance in the hands of the carrier's agent. The law makes such agreements as to rebate, etc., void, but does not make the contract of affreightment otherwise void, and we think there is nothing in the*

law or the policy of it which requires a construction that would excuse a carrier from all liability when it made such a contract in connection with that for receipt and transportation of freight. Such a construction would encourage rather than discourage such unlawful agreements for rebates. The carrier might prefer them to liability for the freight. Such a contract for rebate would be void, and could not be enforced; but we think the shipper could, nevertheless, recover for loss of his freight through the carrier's and insurer's negligence. No different construction has yet been put upon the Inter-State Commerce law so far as we are advised, and we decline to give it any other.' (This Court thereupon say:) We concur in the correctness of this conclusion of the State Supreme Court."

It will be thus seen that the contract of affreightment was directly involved and that the Supreme Court of Tennessee pass directly upon the question of illegality without regard to the question of who was to get the rebate, and that the Supreme Court of the United States expressly approve that holding, saying after quoting what is said by the Supreme Court, "We concur in the correctness of *this* conclusion of the State Supreme Court."

It is further said by counsel for appellant, in attempting to differentiate, that that case was decided before the amendments to the Inter-State Commerce Act, which are now in existence, and which prohibit the shipper from doing anything or imposes a penalty on him. This certainly can make no difference in a case where the shipper is innocent of any wrong-

ful intent, and does not knowingly violate the law, but relies upon the statement of the carrier. *Standard Oil Co. vs. U. S.*, 164 Fed., 376; *Armour Packing Co. vs. U. S.*, 209 U. S., 56; 52 Law Ed., 681. In the report of the case mentioned in the Co-Operative Law edition will be found on page 681 a note by the editors, as follows: "But a contract for special rates, in violation of the Inter-State Commerce Act, will not invalidate the contract of affreightment so as to exempt the railroad company from liability on its bills of lading, and prevent a recovery by the shipper for loss or damage to the goods while in course of transportation. *Merchants' Cotton Press & Storage Co. vs. Ins. Co. of N. A.*, 151 U. S., 368; 38 L. Ed., 195; 4 Inters. Com. Rep., 499; 14 Sup. Ct. Rep., 367."

This shows the view of the editors of that report as to the relevancy of the Cotton Press Co.'s case, and we submit that their view is correct.

It will be seen that the above case, which involved many thousands of dollars, presented and decided the very question at issue against the contention of the appellant in this case.

See also *Central of Georgia vs. Sim (Ala.)*, 53 So. R., 826.

The shipper can only be held to have violated the act, including the Elkin amendment, if he had guilty knowledge of it. He is not in *pari delicto* with the carrier. In the case at bar it clearly appears that the shipper had no knowledge of any preference, and relied absolutely upon the statement

of the carrier's agent given him after the third application for it, and after looking up the question of rate, etc.

In the famous case of the Standard Oil Co., it was held by the Court of Appeals that the Standard Oil Company could not be held guilty of a violation of the act, unless it had actual knowledge of a preferential rate.

Standard Oil Co., vs. U. S., 164 Fed. 376.

In that case Judge Grosseup, who delivered the unanimous opinion of the Court, said:

"The Inter-State Commerce Act was intended to promote, not restrain, trade and commerce, to secure fair dealing in commerce through uniformity, not to put obstructions in the way of commerce. *Tex. & Pac. R. R. vs. I. S. C. C.*, 162 U. S., 197 (40 L., 940). Surely the farmer who brings his products to town to be shipped to the city markets or the small merchant shipping to the country, or the householder who ships his furniture, when changing his residence, were not meant by the Inter-State Commerce law to be guilty of having accepted a concession merely because they took the word of the carrier or his agent, as to what the rate was, accepting such rate stated in the honest belief that it was in fact the regularly established rate. In this respect the shipper and carrier stand on different ground. But is the ordinary shipper, under any reasonable view of the situation to which the law relates thus bound, bound at his peril under this law intended to promote commerce, to cipher out before he can safely put anything he has into commerce, all the confusing papers and

figures that generally make up the tariff sheet? Plainly not, it seems to us. As to him the language of Bishop (Bishop New Crime Law, Sec. 286, seems sound, that:

“ ‘It is never right to punish a man for walking circumspectly in the path which appears to be laid down by the law, even though some fact which he is unable to discover renders the appearance false. And for the Government, whether by legislation or judicial decree to inflict injustice on a subject, is to injure itself more than its victim. And the Court should in all circumstances so interpret both the common law and the statutes as to avoid this wrong.’ ”

The Court in that case further says:

“ ‘Indeed, the whole question is the fundamental one of whether a shipper is guilty, under the Inter-State Commerce Act, of having accepted a rate less than the lawful published rate, even though he does not know, at the time, that the rate accepted was in fact less than the published rate, thereby having no intent to violate the law; or, as the Supreme Court stated the question in *Armour Packing Company vs. United States* (decided March 16, 1908), 209 U. S., 56; 28 Sup. Ct. 428; 52 L. Ed.—, whether ‘shippers who pay a rate under the honest belief that it is the lawful published rate, when in fact it is not, are liable, under the statute, because of a duty resting on them to inform themselves as to the existence of the elements essential to establish a rate as required by law.’ ”

(2.) The general rule that an illegal contract is void and unenforceable is qualified by the exception that where a contract is not evil in itself and its in-

validity is not denounced as a penalty by the express terms or by rational implication from the language of the statute which it violates, and that statute prescribes other specific penalties, it is not the province of the courts to do so, and they will not thus affix an additional penalty not directed by the law-making power.

Dunlap vs. Mercer, 156 Fed. R., 545 at 551.

Logan Co. Nat. Bank vs. Townsend, 139 U. S., 67.

Fritts vs. Palmer, 132 U. S., 282.

Xenia First N. Bank vs. Stewart, 107 U. S., 676.

St. U. N. Bank vs. Mathews, 98 U. S., 621.

Fackler vs. Ford, 24 Hon. U. S., 322.

Harris vs. Runnels, 12 Id., 79.

People vs. Rose, 219 Ill., 46 at 63.

Bea vs. People, 101 Ill. App., 132.

Pangborne vs. Westlake, 36 Ia., 546.

Wenninger vs. Mitchell, 139 Mo. App., 420.

Hobbs vs. Boatright, 195 Mo., 663.

Dural vs. Wellman, 124 N. Y., 156.

Mitchner vs. Watts, (Ind.), 96 N. E., 127.

Brady vs. Central Western R. Co., (Neb.), 130 N. W., 575.

9 Cyc., 550 and 552.

There is another exception stated by Prof. Lawson in 9 Cyc., 551, as follows: "Where the parties to a contract against public policy or otherwise illegal are not in *pari delicto*, or equally guilty, which may

not be, and where public policy is considered as advanced by allowing either, or at least the more excusable of the two, to sue for relief against the transaction, relief is given to him." The author cites many cases fully sustaining the text.

The Supreme Court of Illinois, speaking of the matter in this case say, 242 Ill., at p. 432:

"Appellant's position is, that the contract being void, appellee is without right to recover anything on account of its violation, and it is urged in this connection that appellee is conclusively presumed to have notice of the provisions of the Inter-State Commerce Act, and to know, not only that he contracted for a lower rate than that which he was entitled to, but also that he contracted for a special service in shipment by a designated train to which he was not entitled, and for which appellant could not contract without violation of the act last referred to. Whatever the presumption may be, it is certain from the evidence that appellee did not actually know either that he was obtaining a rate that was unlawful because it was too low, or that he was contracting for a special privilege, which he could not lawfully obtain. It is also certain that the schedules showing the rates are so complicated and the rates fixed are so hedged about with conditions and subject to such exceptions that no man not entirely familiar with such schedules could within any reasonable length of time ascertain from them so simple a thing as the rate per car-load lot for the shipment of horses from Springfield, Illinois, to New York City. The freight agent of appellant, although he had these schedules at hand, was unable to give the desired information un-

til the third application was made to him. Schedules so prepared are of little real value to the ordinary shipper. Practically, they leave him at the mercy of the agent of the carrier. It has been frequently held in other jurisdictions that the contract for an Inter-State shipment is void as to the rate, under the provisions of the Inter-State Commerce Act, if the rate fixed is less than the rate charged other shippers for a like and contemporaneous service, and that, even where the carrier has contracted for the lower rate, it may collect the rate fixed by its schedules filed and published pursuant to the provisions of the law. * * * It seems clear to us that the shipper entered into this contract in good faith and without actual knowledge of its claimed unlawful character, and even if the contract were construed to be void as to the rate fixed, and even if the company may be permitted to collect the proper rate, still the rights of the shipper under the contract are not in other respects different from what they would have been if the contract had been free from the illegality mentioned. This view finds support in the case of *Merchants Cotton Press and Storage Co. vs. Insurance Co. of North America*, 151 U. S., 368. There it was charged that special rates, rebates or drawbacks had been allowed, and that the contract was for that reason void in every respect. The court held that the Inter-State Commerce Act made the agreement as to the special rates, rebates or drawbacks void, but did not otherwise invalidate the contract of affreightment. And in the late case of *Standard Oil Co. vs. United States*, 164 Fed. Rep., 376, the United States Circuit Court of Appeals held that the ordinary shipper, under any reasonable view of the Inter-State Com-

merce Act, was not bound to cipher out, before he could safely put his property into commerce, all the confusing papers and figures that generally make up the tariff sheet. That case was, it is true, a criminal case, but we see no reason why the rule there announced should not apply in a case like this."

That court also says:

"We do not regard the cases relied upon by appellant as in point."

Moreover, in the case at bar, defendant in error was obliged to and did pay \$29.95 in excess of the rate given him, of which \$19.95 has never been returned or explanation given of the cause of its collection or retention.

III.

There is nothing in the holding of the Illinois Courts that the limitation of recovery to \$100 for each animal was not binding, that in any way conflicts with any provisions of the Inter-State Commerce Act.

In Illinois, the law is well established that a carrier cannot limit its common law liabilities unless the shipper knowingly assented and agreed to such limitation, and whether there was such assent or not, is a question of fact.

In this case it is said by the Supreme Court of Illinois, 242 Ill., 428 and 429:

"The instrument signed by Kirby contained a number of provisions limiting the common law

liability of the appellant in such manner that no recovery could be had in this case if appellee was bound by those provisions. The evidence shows that the instrument, already prepared, was presented to Kirby by the bill clerk and Kirby was directed to 'sign there;' that he signed without reading the contract and without knowledge of its contents, because, as he says, he knew the company would not take his horses if he did not sign. Irrespective of this document there was evidence, as above indicated, showing that appellant was bound to transport these horses and have the car put in the Horse Special on the Michigan Central lines. Whether appellee knowingly assented to the provisions contained in the written instrument which he signed, whereby the common law liability of appellant was limited, was upon this record a question of fact to be finally determined by the Appellate Court. *Chicago and Northwestern Railway Co. vs. Calumet Stock Farm*, 194 Ill. 9; *Cleveland, Cincinnati, Chicago and St. Louis Railway Co. vs. Patton*, 203 id. 376; *Wabash Railroad Co. vs. Thomas*, 222 id. 337."

It will be observed that none of the restrictive provisions limiting the liability of the railroad in this case as a common carrier, which are contained in the written contract signed by appellee and incorporated in the schedule filed in pursuance of the Inter-State Commerce Act, are to be found in the Act itself. And in the matter of Released Rates, 13 Inter-State Commerce Reports 550, the Inter-State Commerce Commission condemns the action of the carriers in regard to some of these restrictive provisions. It is there held by the Commission "that

such a stipulation is void as against loss due to the carrier's negligence, or other misconduct, if the specified amount does not purport to be an agreed valuation, but has been fixed arbitrarily by the carrier without reference to such value." And, "again the stipulation that shipments not made as above provided are subject to an additional charge of twenty per cent is unreasonable. A certain differential between rates which leave the carrier's liability unlimited and rates which provide for a limited liability is obviously proper, but the differential should exactly measure the additional insurance risk which the carriers assume when the liability is unlimited. An increased charge of twenty per cent is manifestly out of all proportion to the larger risk involved and its virtual effect is to restrict the public to rates calling for limited liability. Herein lies the vice in stipulations of this character. It is a mischievous practice for carriers to publish in their tariffs and bills of lading rules and regulations which are misleading, unreasonable or incapable of limited enforcement in a court of law."

This Court has in several cases passed upon the question, and in the Appellate Court opinion, 146 Ill. App., 31, those cases, as also their application to the case at bar, are discussed on pp. 44 to 47, of that opinion.

The Court there say :

"In *C. M. & St. P. Ry. Co. vs. Solan*, 169 U. S., 133, it is held that a State statute providing that no contract, receipt, rule or regula-

tion shall exempt any corporation engaged in transporting persons or property by railway from liability of a common carrier or carrier of passengers, which would exist had no contract, receipt, rule or regulation been made or entered into was not void as an attempt to regulate inter-state commerce, as applied to a contract of inter-state transportation whereby the carrier attempted to limit its liability for personal injuries resulting from the negligence of its servants to the sum of \$500, and the plaintiff was permitted to recover \$1,000, as damages for a personal injury, notwithstanding a clause in the contract which limited the liability of the carrier to a sum not exceeding \$500.

“In *Penn. R. R. Co. vs. Hughes, et al.*, 191 U. S., 477, the defendants in error brought suit in a court of common pleas of Philadelphia against plaintiff in error to recover damages for injuries to a horse shipped by defendants in error from Albany, New York, to Cynwyd, Pennsylvania. The contract of shipment embodied in the bill of lading issued by the initial carrier provided, among other things, that neither the initial carrier nor any connecting carrier should be liable in any event for any loss or damage beyond the valuation therein fixed, as follows: ‘If horses or mules—not exceeding \$100 each.’ The through rate of freight was collected by the agent of plaintiff in error at Cynwyd and was the reduced tariff rate usually charged on like shipments under bills of lading which contained the limited liability clause above recited. The horse was transported in safety to the end of the line of the initial carrier and delivered to plaintiff in error, as the connecting carrier, and

injured while the car was standing on the track of plaintiff in error in Philadelphia. A trial by jury in the Court of Common Pleas resulted in a verdict and judgment against plaintiff in error for \$10,000. There was no statute in Pennsylvania prohibiting common carriers from making a contract of shipment upon the basis of an agreed valuation for the purpose of establishing a rate, but the policy and law of Pennsylvania as declared by her courts of last resort did not permit such limitations on the liability of common carriers. The judgment of the State Court was affirmed.

“Referring to the several provisions of the act to regulate inter-state commerce as bearing upon the question involved, the Court said: ‘While under these provisions it may be said that Congress has made it obligatory to provide proper facilities for inter-state carriage of freight, and has prevented carriers from obstructing continuous shipments on inter-state lines, we look in vain for any regulations of the matter here in controversy. There is no sanction of agreements of this character limiting liability to stipulated valuations, and until Congress shall legislate upon it, is there any valid objection to the state enforcing its own regulation upon the subject, although it may to this extent indirectly affect inter-state commerce contracts of carriage.’ ‘It is well settled that the State may make valid enactments in the exercise of its legislative power to promote the welfare and convenience of its citizens although in their operation they may have an effect upon inter-state traffic.’

“The Court further quoted approvingly from the opinion in *C., M. & St. P. R. Co. vs. Solan*, *supra*, as follows: ‘A carrier exercising his calling within a particular State, although engaged in the business of inter-state commerce, is answerable, according to the law of the State, for acts of non-feasance or of misfeasance committed within its limits. If he fails to deliver goods to the proper consignee at the right time and place, or if, by negligence in transportation, he inflicts injury upon the person of a passenger brought from another State, the right of action for the consequent damage is given by the local law. It is equally within the power of the State to prescribe the safeguards and precautions foreseen to be necessary and proper to prevent by anticipation, those wrongs and injuries, which, after they have been inflicted, the State has the power to redress and to punish. The rules prescribed for the construction of railroads, and for their management and operation, designed to protect persons and property, otherwise endangered by their use, are strictly within the scope of the local law. They are not, in themselves, regulations of inter-state commerce, although they control, in some degree, the conduct and the liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the State to regulate the relative rights and duties of all persons and corporations within its limits.’ Continuing, it is said: ‘It is true that this language was used of a statute of Iowa enacting a rule of obligation for common carriers in that State. But

the principle recognized is that, in the absence of Congressional legislation upon the subject, a State may require a common carrier, although in the execution of a contract for inter-state carriage, to use great care and diligence in the carrying of passengers and transportation of goods, and to be liable for the whole loss resulting from negligence in the discharge of its duties. We can see no difference in the application of the principle based upon the manner in which the State requires this degree of care and responsibility, whether enacted into a statute or resulting from the rules of law enforced in the State courts. The State has a right to promote the welfare and safety of those within its jurisdiction by requiring common carriers to be responsible to the full measure of the loss resulting from their negligence, a contract to the contrary notwithstanding. This requirement in the case just cited is held not to be an unlawful attempt to regulate inter-state commerce in the absence of Congressional action providing a different measure of liability when contracts, such as the one now before us, are made in relation to inter-state carriage. Its pertinence to the case under consideration renders further discussion unnecessary.'

"Counsel for appellant insist that the doctrine announced in the *Solan* and *Hughes* cases, *supra*, is only applicable in cases where negligence is the *gravamen* of the action, but we are unable to appreciate any substantial reason for the distinction sought to be made. The language of the court in the *Solan* case, *supra*, heretofore quoted, as follows: 'A carrier exercising his calling within a particular State, although engaged in the business of inter-state com-

merce, is answerable according to the law of the State, for acts of nonfeasance or of misfeasance committed within its limits. If he fails to deliver goods to the proper consignee at the right time and place, or if by negligence in transportation he inflicts injury upon the person of a passenger brought from another State, the right of action for the consequent damage is given by the local law,' suggests that the doctrine announced is as applicable to cases involving the breach of a contract as it is to cases arising in tort."

See also *Richmond A. R. Co. vs. Patterson T. Co.*, 169 U. S., 311.

Latta vs. Chicago St. P. & M. & O. Ry. Co.,
172 Fed. Rep., 850, 97 C. C. A., 198.

Cranmer vs. C., R. I. & P. Ry. Co., (Ia.) 133
N. W., 387.

L. & N. R. Co. vs. Warfield, 6 Ga. App., 550.

Kissinger vs. Fitzgerald, 152 N. C., 247.

In conclusion we respectfully submit that from every point of view the judgment of the Illinois Courts was correct and should be affirmed.

JAMES M. GRAHAM,
ALBERT SALZENSTEIN,
Counsel for Defendant in Error.

225 U. S.

Syllabus.

CHICAGO & ALTON RAILROAD COMPANY v.
KIRBY.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 226. Argued April 25, 1912.—Decided May 27, 1912.

The implied agreement of a common carrier is to carry safely and deliver at destination within a proper time; evidence of diligence and no unreasonable delay excuses.

A carrier who agrees to expedite assumes a more burdensome liability and can exact a higher rate than where mere carrier's liability exists.

An interstate carrier can assume an extra liability for expediting, provided it makes and publishes a rate therefor and opens it to all.

To agree with a particular shipper to expedite a shipment at regular rates, where no rate has been published for special expediting, is a discrimination and as such a violation of the Elkins Act of February 19, 1903, 32 Stat. 847, c. 708, and relief on the contract will be denied.

The broad purpose of the Commerce Act to compel the establishment of reasonable rates and uniform application will not be defeated by sanctioning special contracts giving special advantages to particular shippers.

To guarantee a particular connection and transportation by a particular train amounts to giving a preference when not open to all and provided for in the published tariffs, and under the Elkins act is an illegal discrimination.

A shipper is presumed to know what the published rates are, and if they do not contain provisions for the special service guaranteed to him he must be taken as having contracted for a rate discriminatory in his favor.

Where plaintiff sues only on a special contract for prompt delivery by specified train, and there is no count for negligence as a carrier only, his claim for damages based on such negligence is not presented, and cannot be considered, on the record.

242 Illinois, 418, reversed.

THE facts, which involve the validity under the Elkins Act of a special contract for prompt delivery of goods by an interstate carrier, are stated in the opinion.

Mr. Garrard B. Winston and Mr. William Patton, with whom Mr. Silas H. Strawn was on the brief, for plaintiff in error:

The guarantee of special delivery upon which alone this suit was brought is an unlawful discrimination, and, therefore, void. *New Haven R. R. Co. v. Int. Com. Comm.*, 200 U. S. 361, 391.

The case was brought in assumpsit, not upon the common-law obligation of the railroad to carry within a reasonable time without negligent delay, but upon a special contract of guarantee to connect Kirby's car of horses with the "Horse Special" of the Michigan Central Railroad Company. *Armour Packing Co. v. United States*, 209 U. S. 56, 80.

The contract set out in the declaration being for a special service not noted in, but on the contrary prohibited by, the published tariffs, even if made, was void, as being in violation of the sections of the Interstate Commerce Act prohibiting discrimination, and no recovery can be had thereon. *Tex. & Pac. Ry. Co. v. Cotton Oil Co.*, 204 U. S. 439.

No service, privilege or facility may be extended to a shipper by a carrier which is not provided for and set out in the filed and published tariff.

The facility and service of specially expedited transportation, or transportation by a particular connection or train, is such that it requires publication to be lawful. *Barnes on Interstate Transp.*, § 415; *Elliott on R. R.* (2d ed.), § 1684; *Shiel v. I. C. R. Co.*, 12 I. C. C. Rep. 211; *Diamond M. Co. v. B. & M. R. Co.*, 9 I. C. C. Rep. 311; *St. L., H. & G. Co. v. M. & O. R. Co.*, 11 I. C. C. Rep. 90; *Re Rates and Practices of M. & O. R.*, 9 I. C. C. Rep. 373, 380; *Re Rates on Cotton*, 8 I. C. C. Rep. 121; *Com. Club of Duluth v. N. P. R. Co.*, 13 I. C. C. Rep. 288; *Victor Fuel Co. v. A., T. & S. F. R. Co.*, 14 I. C. C. Rep. 119; *K. C. Hay Co. v. St. L. & S. F. R. Co.*, 14 I. C. C. Rep.

631; *Follmer & Co. v. G. N. R. Co.*, 15 I. C. C. Rep. 33; *Nat. L. Co. v. S. P. L. A. & S. L. R. Co.*, 15 I. C. C. Rep. 434; *Barrett Mfg. Co. v. Cent. R. Co.*, 17 I. C. C. Rep. 464; *Armour Car Lines v. So. Pac. R. Co.*, 17 I. C. C. Rep. 461; Beale & Wyman, R. R. Rate Reg., § 748.

The giving of a greater service in consideration of the tariff rate than is noted in the tariff is unlawful. See the Hepburn Act of 1906, which provides specifically against the very thing which the Commission had already provided against by construction of the act before that amendment. *Tex. & Pac. Ry. Co. v. Cotton Oil Co.*, 204 U. S. 447.

The Alton had complied in every respect with the provisions of the act with reference to filing and publishing its joint tariffs.

These tariffs consisted of three documents, all of which must be construed together to arrive at the rate, and the service to be given for that rate, viz., the Official Classification, the Joint Interstate Tariff, and the List of Stations Taking Percentage Rate Bases.

These documents must be read together to arrive at the rate and service to be performed for the rate. *Man. Ins. Co. v. Erie & W. T. Co.*, 75 N. W. Rep. 62.

The classification sheet is binding on both carrier and shipper. *Smith v. Gt. N. Ry. Co.*, 107 N. W. Rep. 56.

The elements of classification are those that "affect either the cost or risk of carriage to the carrier, or the value of carriage to the shipper."

So the elements must necessarily be important which impose a greater degree of care on the carrier. Beale & Wyman, R. R. Rate Reg., § 586; *Millinery Jobbers' Asso. v. Am. Exp. Co.*, 20 I. C. C. Rep. 498.

The contract for the shipment of the horses was that implied by the law from the rate quoted, and no other condition or term could be added to that contract in consideration of that rate, and hence Kirby cannot re-

cover. *Smith v. Great Northern R. Co.* (N. Dak.), 107 N. W. Rep. 56.

If the rate is duly published and thus called to the attention of shippers and consignees, they cannot depend for the lawful rate or charge on what may be quoted by the carrier's agent, but must be guided by the published tariffs themselves. *Suffern v. I. D. & W. R.*, 7 I. C. C. Rep. 185; *So. Ry. v. Harrison*, 119 Alabama, 539; overruling *M. & O. R. v. Dismukes*, 94 Alabama, 131; *Kinnavey v. Term. Asso.*, 81 Fed. Rep. 802; *B. & O. v. Hamburger*, 155 Fed. Rep. 849. See also *Man. Ins. Co. v. Erie & W. T. Co.*, 75 N. W. Rep. 62; *Church v. Minn. & C. R. Co.*, 14 So. Dak. 443.

The shipper is presumed to know, upon proof of the due filing and publication of the schedules, that they were in existence, open for his inspection. 16 Am. & Eng. Ency. (2d ed.), 161; *Union Pac. R. Co. v. Goodridge*, 149 U. S. 680, 690, etc.; *Gulf & C. R. Co. v. Hefley*, 158 U. S. 98; *Tex. & P. R. Co. v. Cotton O. Co.*, 204 U. S. 426, 439; *Armour P. Co. v. United States*, 209 U. S. 56, 72, 80, 81; *Tex. & P. R. Co. v. Mugg*, 202 U. S. 242; *L. & N. R. Co. v. Mottley*, 219 U. S. 467, 476.

A contract to perform an additional and special service for a shipper for the regular schedule rate is a discrimination in his favor as completely as if he were given the regular schedule service for a lower rate than the tariff rate, or for a different compensation. *Wight v. United States*, 167 U. S. 512; *Railroad Co. v. Mottley*, 219 U. S. 467.

No action can be maintained in which the plaintiff, to make out his case, must necessarily invoke aid from an illegal demand or contract.

For a distinction between the cases in which a contract in contravention of a statute can be enforced and when it cannot, see *Connolly v. U. S. P. Co.*, 184 U. S. 540; *Miller v. Ammon*, 145 U. S. 421; *C. & O. R. R. Co. v. Maysville B.*

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Co., 116 S. W. Rep. 1183; *Gerber v. Wabash R. Co.*, 63 Mo. App. 145.

Where the action is to affirm a contract made in violation of the Interstate Commerce Act, and to recover for a breach thereof, the court will deny any remedy. *R. & G. R. Co. v. Swanson*, 39 L. R. A. 275; *B. & O. R. Co. v. Hamburger*, 155 Fed. Rep. 849; *S. F. & W. Ry. Co. v. Bundick*, 21 S. E. Rep. 995. See also *C. & D. R. Co. v. Maysville B. Co.*, 116 S. W. Rep. 1183, 1185, 1186.

The only contract authorized by the rate paid was for liability subject to official classification, i. e., limited to \$100 per animal, or \$1,200 per carload. *Beale & Wyman, R. R. Rate Reg.*, §§ 590 *et seq.*, 926; 17 Am. & Eng. Ency. (2d ed.), 133.

Carriers may make their rates depend on the value of the animals given by the shipper. *Hart v. Pa. R. R. Co.*, 112 U. S. 331; *Duntley v. B. & M. R. Co.*, 66 N. H. 263; 20 Atl. Rep. 327; *Squire v. N. Y. Cent. R. Co.*, 98 Massachusetts, 245; *T. & P. R. Co. v. Abilene C. O. Co.*, 204 U. S. 439.

Neither can claim more than grows out of the payment of the rate, which has annexed to it a valuation basis. *Mannheim Ins. Co. v. E. & W. T. Co.*, 75 N. W. Rep. 602.

The question was not raised or passed upon in the case of *Penn. R. Co. v. Hughes*, 191 U. S. 477.

This rate, so imposed, cannot be departed from until changed by the legal method. *Poor Grain Co. v. C., B. & Q. R. Co.*, 12 I. C. C. Rep. 418.

There was an erroneous construction and application of Federal cases by the Supreme Court of Illinois.

Mr. Albert Salzenstein, with whom *Mr. James M. Graham* was on the brief, for defendant in error:

There was no unlawful discrimination under the Interstate Commerce Act. *Southern Pacific Co. v. Int. Com. Comm.*, 200 U. S. 585, does not deny the right of common

carriers to adopt a rule under which the right of routing beyond its own terminal is reserved to the initial carrier, as the condition of guaranteeing the through rates of the shipper.

The shipper having the right to use the Horse Special in shipping had the right to select the place he desired to connect with it, and in according him that right no privilege or preference of any kind was given him, but he was given what he or any shipper had a right to demand.

This being true it cannot be said that if the carrier agrees with such shipper to handle his shipment so as to connect with the Horse Special at such place selected by him, such agreement constitutes a contract prohibited by the Interstate Commerce Act.

There was nothing in this arrangement which in any way violated either the spirit or letter of the Interstate Commerce Act. *Foster v. Cleveland, C., C. & St. L. Ry. Co.*, 56 Fed. Rep. 434; *Texas & P. R. Co. v. Int. Com. Comm.*, 162 U. S. 197; *Int. Com. Comm. v. B. & O. Ry. Co.*, 43 Fed. Rep. 37, aff'd, 145 U. S. 263. The language of this case is quoted with approval and applied in subsequent cases. *Cincinnati, N. O. & T. P. R. Co. v. Int. Com. Comm.*, 162 U. S. 197; *Int. Com. Comm. v. Cincinnati & C. R. Co.*, 167 U. S. 479, 493; *Int. Com. Comm. v. Alabama Midland R. Co.*, 168 U. S. 144, 165; *Southern Pacific Co. v. Int. Com. Comm.*, 200 U. S. 536, 554; *Int. Com. Comm. v. Chicago, G. W. R. Co.*, 209 U. S. 108, 119; *Gamble-Robinson Com. Co. v. C. & N. W. Ry. Co.*, 94 C. C. A. 217; 168 Fed. Rep. 16; *United States v. Oregon R. & N. Co.*, 159 Fed. Rep. 975; *Int. Com. Comm. v. C. G. N. Ry. Co.*, 141 Fed. Rep. 1003; Hutchinson on Carriers (3d ed.), § 538.

If the contract had violated the Interstate Commerce Act the right to recover damages occasioned by the neglect and failure of the railroad to notify the Michigan Central in reasonable time to provide for the connection,

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would still exist. *Merchants' Cotton Press Co. v. Insurance Co. of N. A.*, 91 Tennessee, 538; *S. C.*, 151 U. S. 368; *Central of Georgia v. Sim* (Ala.), 53 So. Rep. 826; *Standard Oil Co. v. United States*, 164 Fed. Rep. 376.

The general rule that an illegal contract is void and unenforceable is qualified by the exception that where a contract is not evil in itself and its invalidity is not denounced as a penalty by the express terms or by rational implication from the language of the statute which it violates, and that statute prescribes other specific penalties, it is not the province of the courts to do so, and they will not thus affix an additional penalty not directed by the law-making power. *Dundap v. Mercer*, 156 Fed. Rep. 545, 551; *Logan Bank v. Townsend*, 139 U. S. 67; *Fritts v. Palmer*, 132 U. S. 282; *Xenia Bank v. Stewart*, 107 U. S. 676; *Bank v. Mathews*, 98 U. S. 621; *Fackler v. Ford*, 24 How. 322; *Harris v. Runnels*, 12 How. 79; *People v. Rose*, 219 Illinois, 46, 63; *Bea v. People*, 101 Ill. App. 132; *Pangborne v. Westlake*, 36 Iowa, 546; *Wenninger v. Mitchell*, 139 Mo. App. 420; *Hobbs v. Boatright*, 195 Missouri, 663; *Duval v. Wellman*, 124 N. Y. 156; *Mitchner v. Watts* (Ind.), 96 N. E. Rep. 127; *Brady v. Central Western R. Co.* (Neb.), 130 N. W. Rep. 575; 9 Cyc. 550.

There is nothing in the holding of the Illinois courts that the limitation of recovery to \$100 for each animal was not binding, that in any way conflicts with any provisions of the Interstate Commerce Act.

In Illinois, the law is well established that a carrier cannot limit its common-law liabilities unless the shipper knowingly assented and agreed to such limitation, and whether there was such assent or not, is a question of fact. *Chicago & Northwestern Railway Co. v. Calumet Stock Farm*, 194 Illinois, 9; *C., C. & St. L. Ry. Co. v. Patton*, 203 Illinois, 376; *Wabash Railroad Co. v. Thomas*, 222 Illinois, 337. See also *Richmond A. R. Co. v. Patterson T. Co.*, 169 U. S. 311; *Latta v. Chicago, St. P. & M. O. Ry.*

Co., 172 Fed. Rep. 850; 97 C. C. A. 198; *Cranmer v. C. R. I. & P. Ry. Co.* (Ia.), 133 N. W. Rep. 387; *L. & N. R. Co. v. Warfield*, 6 Ga. App. 550; *Kissinger v. Fitzgerald*, 152 N. Car. 247.

MR. JUSTICE LURTON delivered the opinion of the court.

Action in assumpsit to recover damages for the breach of a special contract for the shipment of a carload of high-grade horses from Springfield, Illinois, to New York city. There was a jury, verdict and judgment, which was affirmed by the Supreme Court of Illinois. The facts essential to be here stated are these: Kirby was engaged in developing high-grade horses, and desired to send a carload to be sold at a public sale to be held in Madison Square Garden, New York city. Several routes were available, and the published live-stock rates for carload shipments were the same by each route. It was, however, desirable to send them by the route which would insure their arrival in the shortest time after delivery to the carrier.

The declaration in substance avers that the plaintiff in error knowing the anxiety of the shipper for quick transportation, and that the horses were to enter the horse sale to be held late in the month, did, on January 24, 1906, contract and agree to carry a car, rented by defendant in error, loaded with horses, for the consideration of \$170.60, over its own rails from Springfield to Joliet, Illinois, and there deliver so that it would be carried by a fast stock train known as the "Horse Special," over the M. C. Railroad, through to New York. Said Horse Special was run but three times each week, and was due to leave Joliet the following morning. It is then alleged that the defendant in error, as directed by the railroad company, delivered and loaded his horses on the afternoon of the twenty-fourth; but that the company did not promptly carry and deliver the same to the said fast stock train on

the morning of the twenty-fifth, as it had guaranteed to do, having failed to make connection with that train; and, that, as a consequence, the car was forwarded by a later and much slower train, and the horses were delivered in New York forty-eight hours after they would have arrived had they been carried by the Horse Special, as the plaintiff in error undertook. As a result of this prolonged transportation, the horses did not reach New York in time to be put in proper condition for the horse sale, whereby the defendant in error sustained damages, aggregating several thousand dollars.

The plaintiff in error pleaded the general issue and under this presented certain defenses which we shall pass by, as not constituting questions of law or fact open to review upon a writ of error to a state court.

The single Federal question arises upon the validity of the contract to so carry these horses as to deliver them at Joliet to be carried through to New York by the Horse Special, leaving Joliet on the twenty-fifth of January.

That the railroad company had established and published through joint rates and charges upon carload shipments of live stock to New York is not disputed. The rates furnished the defendant in error were the regularly published rates. Those rates and schedules did not provide for an expedited service, nor for transportation by any particular train. Neither was Kirby required to pay any other or higher rate for the promised special service, by which his car was to be carried so as to be attached to the fast stock special and carried by it to New York.

By the third section of the original act of February 4, 1887, 24 Stat. 379, it is made unlawful to give any undue or unreasonable "preference or advantage," to any particular person, or to subject any particular person to "any undue or unreasonable prejudice or disadvantage in any respect whatever." By the sixth section of the same act it is required that the carriers subject to the act shall

print and keep for public inspection schedules showing the rates, charges and classifications, "and any rules or regulations, which in any wise change or affect or determine any part or the aggregate of such aforesaid rates and fares and charges." The same section also provides as follows: "And when any such common carrier shall have established and published its rates, fares, and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect or receive from any person or persons a greater or less compensation, for the transportation of passengers or property, or for any services in connection therewith, than is specified in such published schedules of rates, fares, and charges as may at the time be in force."

By the act of February 19, 1903, known as the Elkins Act, amending the act of 1887, 32 Stat. 847, c. 708, it is made "unlawful for any person, persons, or corporation to offer, grant, or give or to solicit, accept or receive any rebate, concession, or discrimination in respect of the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereto whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereto, or whereby any other advantage is given or discrimination is practiced."

The implied agreement of a common carrier is to carry safely and deliver at destination within a reasonable time. It is otherwise when the action is for a breach of a contract to carry within a particular time, or to make a particular connection, or to carry by a particular train. The railroad company, by its contract, became liable for the consequence of a failure to transport according to its terms. Evidence of diligence would not excuse. If the

action had been for the common-law carrier liability, evidence that there had been no unreasonable delay would be an answer. But the company, by entering into an agreement for expediting the shipment, came under a liability different and more burdensome than would exist to a shipper who made no such special contract.

For such a special service and higher responsibility it might clearly exact a higher rate. But to do so it must make and publish a rate open to all. This was not done.

The shipper, it is also plain, was contracting for an advantage which was not extended to all others, both in the undertaking to carry so as to give him a particular expedited service, and a remedy for delay not due to negligence.

An advantage accorded by special agreement which affects the value of the service to the shipper and its cost to the carrier should be published in the tariffs, and for a breach of such a contract, relief will be denied, because its allowance without such publication is a violation of the act. It is also illegal because it is an undue advantage in that it is not one open to all others in the same situation.

In *Armour Packing Company v. United States*, 209 U. S. 57, 72, Mr. Justice Day, dealing with a violation of the act by carrying out a contract for a rate, after the rate had been changed by publication of a higher rate, said:

"The Elkins Act proceeded upon broad lines and was evidently intended to effectuate the purpose of Congress to require that all shippers should be treated alike, and that the only rate charged to any shipper for the same service under the same conditions should be the one established, published and posted as required by law. It is not so much the particular form by which or the motive for which this purpose was accomplished, but the intention was to prohibit any and all means that might be resorted to to obtain or receive concessions and rebates from the fixed rates, duly posted and published."

The broad purpose of the Commerce Act was to compel the establishment of reasonable rates and their uniform application. That purpose would be defeated if sanction be given to a special contract by which any such advantage is given to a particular shipper as that contracted for by the defendant in error. To guarantee a particular connection and transportation by a particular train, was to give an advantage or preference not open to all and not provided for in the published tariffs. The general scope and purpose of the act is so clearly pointed out in *New York, N. H. & H. Railroad Company v. Interstate Commerce Com.*, 200 U. S. 361, 391, and in *Texas & P. Railroad Company v. Abilene Cotton Oil Co.*, 204 U. S. 426, as to need no reiteration.

That the defendant in error did not see and did not know that the published rates and schedules made no provision for the service he contracted for, is no defense. For the purposes of the present question he is presumed to have known. The rates were published and accessible, and, however difficult to understand, he must be taken to have contracted for an advantage not open to others. *Texas & P. Railway Co. v. Mugg*, 202 U. S. 242.

The claim that the defendant in error may recover upon the carrier contract, stripped of the illegality, under *Merchants' Cotton Press Co. v. Insurance Co.*, 151 U. S. 368, is not presented by this record. The declaration counted only upon the breach of a special contract which was illegal. There was no count based upon the carrier's liability for negligence in not promptly shipping and delivering. The judgment was rested upon the damages resulting from the breach of the special contract, and not at all upon the liability of the carrier otherwise.

For the error in not holding the special contract invalid under the Interstate Commerce Act, the judgment must be reversed and the case remanded for such further proceedings as are not inconsistent with this opinion.